JD–32–08
Galion, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HTI HYDRAULIC TECHNOLOGIES, LLC,
A WHOLLY OWNED SUBSIDIARY OF
LIGON INDUSTRIES, LLC,

and Case No. 8–CA–37473

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL–CIO, DISTRICT LODGE 54.

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DECISION

INTRODUCTION

DAVID I. GOLDMAN, Administrative Law Judge. This is a case in which the Government alleges and the employer does not dispute that the employer is a successor employer. It is also undisputed that less than a week after taking over the facility this successor employer operated the plant with a substantial and representative complement of employees, the majority of whom were previously employed by the predecessor employer. The parties also agree that after approximately ten days of operation, additional hiring by the successor employer resulted in a workforce in which the majority of the employees were new employees never employed by the predecessor. Both the Government and the employer accept that the employer was obligated to recognize and bargain with the union that represented the predecessor employer's workforce if and only if the union made a demand for recognition that attached at a time when the majority of the workforce was composed of employees who previously worked for the predecessor. As the parties have framed the dispute, the question is when the union made a recognition demand on the employer.

STATEMENT OF THE CASE

Based on an unfair labor practice charge filed October 16, 2007, and amended December 17, 2007, by the International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 54 (Union), the General Counsel of the National Labor Relations Board (Board) issued a complaint on December 21, 2007, alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (Act) by HTI Hydraulic Technologies, L.L.C. (Ligon). Ligon

filed a timely answer to the complaint denying all violations of the Act. This dispute was tried in Cleveland, Ohio on March 5, and April 3, 2008.[1] Counsel for the General Counsel and Respondent filed briefs in support of their positions on May 1, 2008. On the entire record, including my observation of the demeanor of the witnesses and other indicia of credibility, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint alleges and the parties stipulate that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

a. Background

The Galion, Ohio facility at issue in this case was operated by Hydraulic Technologies, Inc. (HTI) prior to its purchase of the facility by Ligon. HTI manufactured hydraulic cylinders and components.

From about 1998 until September 12, 2007, employees at the Galion plant were represented for purposes of collective bargaining by the Union and its Local 1151. The Union and HTI entered into a series of collective-bargaining agreements with a bargaining unit of production and maintenance employees. HTI entered bankruptcy in July 2007.

In August 2007,[2] Ligon began plans to bid for assets of HTI, including the Galion plant, that were being sold by the bankruptcy trustee. By August 23, Respondent had been named the "stalking horse" in filings with the bankruptcy court.[3] In August and September, in anticipation of being the successful bidder at the bankruptcy auction, Respondent sent letters to current and laid off employees of HTI and began advertising in local newspapers encouraging those interested in employment with Respondent to apply. During this time, and as early as

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[1]At the hearing, the General Counsel's unopposed motion to amend the complaint to delete paragraph 9 (and all references to it in the complaint) was granted. Also at the hearing, Respondent admitted paragraph 3(a) of the complaint, portions of which had been denied in its answer.

[2]Hereinafter all dates are from 2007 unless otherwise indicated.

[3]On my own motion, references in the transcript to "stocking horse" are corrected to "stalking horse." In the bankruptcy context, a stalking horse bidder reaches a tentative purchase-agreement with the debtor-in-possession to acquire assets. As explained by Respondent's Chairman, John McMahon, being named the stalking horse meant that "the company . . . is going to be recommended by the debtor in possession. And you actually negotiate a purchase contract." The "stalking horse" may be outbid at auction, so being the stalking horse does not guarantee ultimate acquisition. However, in some instances there are few or no other serious bidders and the early purchase agreement reached with the stalking horse is the basis for the sale.

August 22, Ligon announced the outlines of the initial terms and conditions it intended to implement, and these involved significant reductions for incumbent employees (compare G.C. Exh. 3 to G.C. Exh. 7, and see R. Exh. 4). In an August 22 memorandum from Ligon to "Current and Former HTI employees," Ligon wrote:

> As you are well aware, HTI is going through bankruptcy proceedings and will likely have new owners on Tuesday, September 11, 2007. If Ligon Industries is the successful bidder at auction, we plan to be open for business and resume operations on September 11, 2007.
>
> In anticipation of being the successful bidder and new owner, Ligon Industries is currently accepting applications to fill jobs as described on the attached. If you have interest in applying, please fill out the application form, which is also attached. All applications must be returned to the following address by September 5, 2007:
>
> Mr. Jay Wagner
> Wagner Law Firm, PLL
> 118 Harding Highway West
> Galion, OH 44833
>
> Selection of employees will be completed by September 7, and you will be notified of the status of your application by September 10. If you accept our offer of employment, you will be expected to report to work on September 11 as an employee of the new company.
>
> Ligon Industries is purchasing the buildings and equipment of HTI and will assume no responsibility for previous contracts, obligations or agreements of the previous owners.
>
> HTI was forced into bankruptcy because its losses were not sustainable. Manufacturing costs were too high. There are many things that must change for the new company to survive and be successful.. We must achieve lower costs through better management, more productive employees, updated equipment and sufficient capital to support efficient operations. Ligon Industries is committed to doing its part.

Attached to the memo were two additional pages outlining the wages and other terms and conditions and benefits that would prevail under Ligon. (The memo refers to an attached application form, but the copy of the memo in the record does not contain such an attachment.)

On the morning of September 11, plant manager Scott Thornsberry informed the HTI employees in a meeting at the plant that Ligon had been the successful bidder and would be taking over the operations. All HTI bargaining unit employees were offered employment. However, the majority of HTI unit employees did not continue with Ligon. Employees were told that if they wanted to remain employed they could just keep working. If they did not, HTI would pay them for the remainder of the day and they could take their tools and go home. Thornsberry estimated that 2/3 of the employees at the meeting decided to go home and did not accept employment with Ligon.

Since assuming the operations, Respondent has operated the Galion plant to continue HTI's business of manufacturing hydraulic cylinders and components used in construction and agriculture. The plant continued to operate with the same general manager (Glen Campbell) and plant manager (Scott Thornsberry), and six of seven supervisors remained working at Galion for Ligon. Thornsberry testified that during the month of September, with the changeover to Ligon, his duties and authority and responsibilities remained unchanged. The majority of the office staff also remained after the changeover to Ligon. Both old and newly introduced equipment and production methods were used by Ligon to produce products for sale to former customers of HTI and other customers. At the changeover, 2/3 of the customer base remained the same. The effect has been to substantially continue the manufacturing operations and business of HTI at the same location. There was no hiatus or period during which the plant was closed between the time ownership was transferred from the bankrupt HTI to Ligon.

The plant operated with reduced manpower for the first weeks under Ligon while it hired additional employees. However, by the end of the week of September 11, Ligon had some employees working in every job classification.

The parties stipulate that no later than September 17, and continuing thereafter, Respondent had hired a substantial and representative complement of employees into bargaining unit positions.

The parties stipulate that prior to September 21, a majority of the operative employees hired by Respondent at the Galion plant were former employees of HTI.

Finally, the parties stipulate that beginning September 21, and continuing thereafter, a majority of the operative employees at the Galion plant were not former employees of HTI.

b. Contacts Between the Union and Ligon

i. McMahon's August 23 phone call to Gilkison

On August 23, Union Representative Earl Gilkison telephoned James Delk, the CEO of Ligon, at Ligon's headquarters in Birmingham, Alabama. Gilkison had met Delk during a plant tour of the Galion facility and Gilkison later learned from the union's attorneys that Ligon had been named the "stalking horse" in filings made with the bankruptcy court.

Delk was out-of-town, and the Chairman of Ligon, John J. McMahon, accompanied by two other employees from his office, returned the call to Gilkison. McMahon and Gilkison both testified about this telephone call. According to McMahon,

> [Gilkison] congratulated us on being the stalking horse. And we sort of chatted for a moment about the expected procedure on that. He then asked if we would work with the union in terms of selecting and—and getting a good group of employees.
>
> He said they obviously knew the employees well and wanted to know if we would, I think the word was 'work' with the union.

McMahon told Gilkison, "Not at this time." They both laughed, expressed mutual assurances that they would see each other in the future, and the conversation ended.

Gilkison recalled McMahon starting the call by saying that he was returning the call that Gilkison had made to Delk. Gilkison testified:

> I told him I understand through our attorneys that he was—his company was the stalking horse to purchase HTI. And I would like to meet with him, if at all possible, to see if we could establish some kind of working relationship.

McMahon responded, "No, sir, not at this time." Gilkison then asked McMahon "if he was gonna recognize the con—contract, recognize the union." McMahon responded, "No, not at this time. Asked on cross examination whether he demanded recognition in the conversation, Gilkison replied, "Yes, sir, I did, or I felt I did." Gilkison reaffirmed that he asked McMahon to recognize the contract with the Union, and that he considered this to be a demand for recognition.

ii. September 12 conversation and phone call

The parties pointedly dispute the events of September 12.

Undisputed is that on this day, the day after a majority of HTI employees quit rather than continue working for Ligon under the inferior terms and conditions Ligon was establishing, Union Representatives Gilkison and Andrew Campbell arrived at the plant between 6 a.m. and 6:30 a.m., and began handbilling and passing out authorization cards to entering employees. Gilkison and Campbell were handbilling to provide information to the employees about the sale of the HTI plant to Ligon. They were also there as part of the Union's election drive, which resulted, the next day, September 13, in the Union filing a representation petition with the Board's Regional office. That representation election was originally scheduled for October 26, pursuant to a stipulated election agreement between the parties.

The morning of September 12, Gilkison and Campbell handbilled until approximately 7 a.m. or 7:30 a.m. Gilkison and Campbell left when no further employees were entering or leaving the plant. They stopped for breakfast and coffee in a diner in town. Gilkison testified that while in the diner he reviewed a list of employees he composed as he saw and talked with entering employees that morning. Gilkison said it occurred to him that he recognized most of the employees going into the plant, and thus, "I came to the conclusion we still had majority status with the employees that went in that morning." With that realization, Gilkison testified that he told Campbell, "'I'm gonna go back to the company . . . and request recognition from the company."'' Accompanied by Campbell, Gilkison headed back to the facility and looked for General Manager Glen Campbell's vehicle. The union organizers entered the main entrance and headed for the lobby telephone to call Campbell. Before they could reach the phone, plant manager Thornsberry walked out from the offices and approached them. Thornsberry, a former union machinist at the plant, knew both men, and, in particular, had known Gilkison for many years.

Gilkison testified that he told Thornsberry that "basically the only reason I was there is I'd like to speak to Mr. Campbell." Thornsberry told Gilkison and Andy Campbell that Glenn Campbell was unavailable as he was meeting with Ligon attorneys. Gilkison testified that he told Thornsberry "I was there, I'd like to ask for recognition for the Union." Gilkison and Campbell both testified that Thornsberry told them that Thornsberry and Glenn Campbell had been told to direct inquiries related to the Union to Ligon headquarters in Alabama. Gilkison said that wasn't a problem, he thought he had the number in his office and he would make the call to Alabama. After that the three just talked casually about the company's need for machinists and joked about Andy Campbell and Gilkison putting in applications.

Thornsberry testified about this conversation and Thornsberry recalled a casual conversation that began when he was heading back from a production area and someone said that "Earl's" in the lobby, so he went to greet him. Thornsberry testified that Gilkison, Campbell, and he discussed the need for more machinists and the fact that so many HTI employees had quit. But Thornsberry denied that there was any mention made during the conversation about "recognition" or "recogniz[ing]." In addition, he said that the word "bargaining" was never used, and he denied that Gilkison or Campbell asked to meet to bargain or proposed any dates or times for bargaining.

Gilkison testified that after the conversation with Thornsberry, he dropped Campbell at the local union hall and drove to his office in Ashland, Ohio. He prepared to call Ligon's Alabama headquarters by looking up the number on the internet and, he testified that he made some notes on a piece of paper of what he wanted to say to McMahon. The notes were introduced into evidence. Before talking with McMahon Gilkison wrote:

> Call Mr. McMahon
> congratulate him on purchase of HTI
> See if he Will Agree to Recognize the IAM+AW Union. +
> If So, tell him We
> Can assist him in
> Anyway to fill the jobs.

According to Gilkison, he spoke with McMahon. Gilkison said,

> [b]asically I congratulated him on the purchase of Hydraulic Technologies, Incorporated. And I told him I—again, I reiterated to him who I was. He remembered me from my first call. And told him I would like to work out a working relationship with him and would like for him to recognize the union.

According to Gilkison, McMahon responded, exactly as he had on August 23, stating "No, sir, not at this time." Gilkison did not recall what, if anything else was said in the conversation.

McMahon testified and emphatically denied that he had spoken with Gilkison on September 12 (or any time other than the August 23 conversation described above). Based on questioning about his daily routines, and meetings scheduled, McMahon indicated that he would have been in the office at Ligon headquarters that morning, before heading out to a meeting around 11:45 a.m. Central Daylight Time. However, McMahon testified that he was "absolutely certain" that the conversation alleged by Gilkison did not occur.

iii. October 5 written demand for recognition

The parties agree that on October 5, Gilkison sent the Union's first written demand for recognition to Ligon. That letter, written to Galion plant General Manager Glenn Campbell stated:

Dear Mr. Campbell,

> The majority of your employees are former employees of Hydraulic Technologies, Inc., and members of the International Association of Machinists and Aerospace Workers District 54, Local Lodge 1151. Therefore, we consider

> Hydraulic Technologies, LLC a successor employer and demand recognition. We stand ready and willing to meet with you at a mutually agreeable date, time and place to negotiate a Collective Bargaining Agreement. Please respond to this demand within (7) Seven days of the date of this letter.
>
> Sincerely,
>
> Earl E. Gilkison
> Business Representative
> IAM&AW, District 54

The parties agree that by the time this letter was sent to Respondent, a majority of the bargaining unit employees were not former employees of HTI. Campbell wrote a spirited response to Gilkison, dated October 12, accusing him of trying to keep the employees from having the representation vote on October 26, and stating that Gilkison knew from the list of voting employees supplied in connection with the upcoming election that the majority were not former employees of HTI.

c. Legal Analysis

The Supreme Court has recognized that "[t]he 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." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996). "To such ends, the Board has adopted various presumptions about the existence of majority support for a union within a bargaining unit, the precondition for service as its exclusive representative." Id. at 785–786. As the Board explained in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 720 (2001):

> Absent specific statutory direction, the Board has been guided by the Act's clear mandate to give effect to employees' free choice of bargaining representatives. The Board has also recognized that, for employees' choices to be meaningful, collective-bargaining relationships must be given a chance to bear fruit and so must not be subject to constant challenges. Therefore from the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective-bargaining relationships, as well as employee free choice, by presuming that an incumbent union retains its majority status.

In *Fall River Dyeing & Finishing Corp.*, 482 U.S. 27, 39 (1987), the Supreme Court considered the circumstances in which a union's rebuttable presumption of majority support should continue where there has been a change in employer. For reasons described at length in the Court's opinion, the Court recognized that the rationale for the presumption of an incumbent union's majority support is "particularly pertinent in the successorship situation." 482 U.S. at 39. Accordingly, in *Fall River Dyeing*, the Court held that a union's rebuttable presumption of majority support "continues despite the change in employers. And 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; *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972).

The fact of successorship is straightforward in this case. The Board's successorship approach "requires that the Board focus on whether the new company has `acquired substantial

assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.'" *Fall River*, 482 U.S. at 43 (quoting *Golden State Bottling v. NLRB*, 414 U.S. 168, 184 (1973)). "Hence, the focus is on whether there is a `substantial continuity' between the enterprises." *Fall River*, 482 U.S. at 43. "Under this approach, the Board examines a number of factors: whether 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." Id.; *Great Lakes Chemical Corp.*, 280 NLRB 1131, 1132 (1986) ("In determining whether there is a substantial continuity the Board has considered several factors including employees, supervisors, employees, employee skills and functions, business location, and equipment and types of product lines"), aff'd, 855 F.2d 1174 (6th Cir. 1988). Most importantly, the question of the substantial continuity of the enterprise is to be analyzed primarily from the "employees' perspective." *Fall River*, 482 U.S. at 43. In its analysis, the Board is mindful of whether "`those employees who have been retained will understandably view their job situations as essentially unaltered.'" Id. (quoting *Golden State Bottling*, 414 U.S. at 184); *Vermont Foundry*, 292 NLRB 1003, 1008 (1989) (calling this "the core question"); *Derby Refining*, 292 NLRB 1015 (1989), enfd. 915 F.2d 1448 (10th Cir. 1990).

In this case, it is not seriously disputed, and I find, that Ligon is a successor employer to HTI. Ligon took over and commenced operations on September 11, 2007, without hiatus in operations, at the same facility, at the same location, producing the same products, with almost the entirely same managerial and office work staff, using the same equipment, with substantially the same customers, and, initially, with a workforce overwhelmingly composed of former HTI bargaining unit employees.

Having found that Ligon was a successor, I must consider if and when Ligon's obligation to recognize and bargain with the Union attached.

In *NLRB v. Burns*, supra, the Supreme Court rejected the Board's position that a successor hiring the predecessor's workforce has an obligation to bargain with the incumbent union before it institutes initial terms and conditions of employment. To the contrary, the Court in *Burns* held that "a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor." 406 U.S. at 294.[4]

However, going forward, once initial terms and conditions are set, the successor's bargaining obligation may attach. The successor's bargaining obligation chiefly turns on whether the predecessor's employees form a majority of its workforce. *Vermont Foundry*, supra at 1009. "As a general rule, the relevant measuring day to determine if the Company employed a majority of union members is the initial date it began operating." Id. That was the case in

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[4]An exception, not applicable here, is where the successor is a "perfectly clear" successor. If from the outset it is "perfectly clear that the new employer plans to retain all of the employees in the unit," the new employer—commonly called a "perfectly clear" successor—is required to recognize and bargain with the union before making any changes to the employees' terms and conditions. *Burns*, supra at 294-295. Ligon's pre-purchase solicitations to the HTI workforce clearly indicated that their continued employment at the facility was conditioned on their willingness to accept new terms, which, under longstanding Board precedent, warrants a finding that the employer is not a "perfectly clear," but, rather, an ordinary successor. *Windsor Convalescent Center*, 351 NLRB No. 44 (2007); *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975).

Burns, where the successor began operating the day after the predecessor ceased operations with a majority of its employees drawn from the predecessor's workforce. *Burns*, supra.

In *Fall River*, the Supreme Court considered a case of a successor that took over a facility and began operations after several months hiatus in operations. The new employer started up operations and hired employees gradually over time. Explicitly contrasting the situation to that in *Burns*, the Court in *Fall River* pointed out that

> [i]n other situations, as in the present case, there is a start-up period by the new employer while it gradually builds its operations and hires employees. In these situations, the Board, with the approval of the Courts of Appeals, has adopted the "substantial and representative complement" rule for fixing the moment when the determination as to the composition of the successor's work force is to be made. If, at this particular moment, a majority of the successor's employees had been employed by its predecessor, then the successor has an obligation to bargain with the union that represented these employees.

482 U.S. at 47 (footnotes omitted).

In this context, the Supreme Court in *Fall River* approved as reasonable the Board's substantial and representative complement rule, which evaluates the successor's bargaining obligation when a substantial and representative complement of employees is hired. In *Fall River* the Court rejected the proposition that the bargaining obligation cannot be assessed, or attach, until an employer has hired its full complement of employees. [5]

In *Fall River Dyeing*, the Court also approved the Board's "continuing demand" rule, including the requirement when applying the substantial and representative complement rule that "[t]he successor's duty to bargain at the 'substantial and representative complement' date is triggered only when the union has made a bargaining demand." 482 U.S. at 53. However, based on the "continuing demand" rule, the demand triggering the bargaining obligation can be made before a substantive and representative complement is hired: "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.'" *Fall River Dyeing*, 482 U.S. at 43; *MSK Corp.*, 341 NLRB 43, 44 (2004) ("where a union demands recognition from a prospective successor employer before that successor has hired a substantial and representative complement of employees, the union's demand is deemed to be a continuing one and the successor's bargaining obligation matures once it hires a substantial and representative employee complement"; the hiring of a substantial and representative complement and a demand for recognition and bargaining "need not occur in any particular order").

From *Fall River*, one might conclude that application of the substantial and representative complement rule should be limited to circumstances akin to the extended start up

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[5]As the Supreme Court in *Fall River Dyeing* explained, the "[substantial and representative complement] rule represents an effort to balance the objective of insuring maximum employee participation in the selection of a bargaining agent against the goal of permitting employees to be represented as quickly as possible. . . . The latter interest is especially heightened in a situation where many of the successor's employees, who were formerly represented by a union, find themselves after the employer transition in essentially the same enterprise, but without their bargaining representative." (internal quotation marks omitted). 482 U.S. at 48–49.

situation described in *Fall River Dyeing*. When a successor immediately begins normal production, as in *Burns*, the composition of the employer's workforce can be measured from day one. *Vermont Foundry*, supra at 1009. Indeed, in those circumstances, there is no reason even to require the formality of a bargaining demand and the employer, though permitted to unilaterally establish initial terms and conditions of employment, may be required to notify and provide the union with an opportunity to bargain before it makes further unilateral changes after operations commence. *Banknote Corp. of America v. NLRB*, 84 F.3d 637, 646 (2d Cir. 1996) (finding a successor's bargaining obligation and duty to forego unilateral changes without notification to the union even in absence of a bargaining demand) (enforcing, 315 NLRB 1041 (1994)), cert. denied, 519 U.S. 1109 (1997).[6]

However, in this case the Government does not contend either that a bargaining demand is unnecessary, or that Ligon's workforce composition should be measured immediately after it took over the operations without hiatus. In fact, without distinguishing the extended start-up situation in *Fall River Dyeing* from the more seamless transfer of operations in *Burns*, many Board cases since *Fall River Dyeing* have tended to apply the substantial and representative complement formula for successorship cases generally, with the requirement that a bargaining demand is necessary to trigger the duty to bargain:

> A successor employer's obligation to recognize the union attaches after 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.

Hampton Lumber Mills-Washington, Inc., 334 NLRB 195 (2001), enfd. 38 Fed. Appx. 27 (D.C. Cir. 2002); *MSK*, supra; *The Market Place Inc.*, 304 NLRB 995, 1000 (1991); *Royal Midtown Chrysler Plymouth Inc.*, 296 NLRB 1039, 1040 (1989).

In *Royal Midtown Chrysler*, supra, the Board found that the date for measuring the composition of the successor employee's workforce is not necessarily, as described in *Burns*, "the initial date it began operating" (*Vermont Foundry*, supra) or, as described in *Fall River*, the date on which a substantial and representative complement is at work. Rather, it is the *later* of the date on which a substantial and representative complement is first reached *and* the date a bargaining demand is made on the employer. Thus, even where an employer has hired a substantial and representative complement, the majority of which worked for the predecessor, the window in which a union can effectively demand recognition closes if the composition of the workforce subsequently changes and leaves predecessor employees in the minority.

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[6]The General Counsel in *Banknote* contended successfully to the Court of Appeals that the uninterrupted operations and immediate hiring of the predecessor employees meant that no bargaining demand was necessary in order to find a bargaining obligation. The Court held:

> [w]hile the two-pronged rule of *Fall River Dyeing* may be appropriate in a situation involving the staggered or gradual hiring of employees during a startup period, or even the hiring of employees after a prolonged delay between the closing and reopening of a business . . . . the absence of a bargaining demand in this case—which involves neither a prolonged startup period and gradual or staggered hiring of employees nor a significant hiatus in operations, but rather, a rapid transition period with the immediate hiring of a full employee complement—does not preclude a finding of a duty to bargain.

84 F.3d at 646.

Accordingly, where a successor initially employs a substantial and representative complement of employees, the majority of whom were employed by the predecessor, but the union fails to make a demand until a time when the predecessor employees are no longer in the majority, the employer is privileged to refuse to recognize and bargain with the union. The Board in *Royal Midtown Chrysler* reasoned,

> the determination of whether the successor has incurred a bargaining obligation must be assessed at [the time of the demand] rather than when successorship takes place. Of course, if a demand is made concurrent with the establishment of successorship or the attainment of a representative complement, or, even prematurely but is continuing, the obligation will attach upon the occurrence of such events. But where no demand is made until some time after successorship and representative complement have occurred, the obligation will rise or fall depending on the union's representation among the unit employees at the time of its demand.

296 NLRB at 1040. Accord, *Bengal Paving Co.*, 245 NLRB 1271, 1272 (1979) (dismissing complaint where General Counsel failed to prove that a demand was made at time when a majority of respondent's employees were former employees of the predecessor).[7]

The reasoning of *Royal Midtown Chrysler* is critical to this case. The General Counsel contends that oral demands for recognition and bargaining were made on September 12. As the parties agree that no later than September 17, a substantial and representative complement of employees was working, the majority of which had previously been employed by HTI, if the General Counsel's contention is upheld then pursuant to the continuing demand rule the employer had a duty to recognize and bargain with the Union no later than September 17. On the other hand, Ligon contends that the first bargaining demand made by the Union was the written demand of October 5. At that point in time, the parties agree, the majority of the employees were new employees never previously employed by HTI. In that case, pursuant to the reasoning of *Royal Midtown*, supra, the Union's demand was ineffective and the presumption of majority support no longer applicable.

This case is notable for the pointed credibility dispute the parties have offered up at trial

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[7]I note that nothing in *Fall River Dyeing* suggests, much less compels this result. Indeed, it is unclear why the existence of a rebuttable presumption of majority support should turn on when the union requests bargaining. One can certainly question how this result comports with the Supreme Court's expressions in *Fall River* of concern for the uncertainty, lack of knowledge, and vulnerability, faced by an incumbent union and employees as a reason for extending the presumption of majority support to successorship situations in the first place. It would be one thing if the "loss" of the presumption of majority support was premised on a finding of undue delay in making a bargaining demand, or a theory of waiver—but that is not the case. Under the reasoning of *Royal Midtown Chrysler*, the timeliness of the union's demand turns not on the alacrity of the union but on the shifting composition of the workforce, a shift that can occur without warning after reaching a substantial and representative complement, and which, *after* a union's bargaining demand, is acknowledged to be irrelevant. Particularly when combined with the General Counsel's apparent view that a bargaining demand should not come too soon (see discussion below), these rules operate to undercut significantly the point of the continuing demand rule, and create the situation criticized by the Supreme Court where a union has to time its bargaining demand based on conditions of which it has limited knowledge and no control.

as the basis for determining the outcome of this case. Two union officials, Gilkison and Campbell, testified to the oral demands for recognition made on September 12, one in the lobby to plant manager Thornsberry, the other by phone to McMahon. Both Thornsberry and McMahon testified and denied these oral demands were made. McMahon denied the conversation even occurred. In addition, on brief, Respondent argues that, even assuming the conversations occurred as claimed by the union officials, these conversations were inadequate as bargaining or recognition demands.

Before addressing the events of September 12, I note the August 23 conversation between McMahon and Gilkison. The complaint alleges only the September 12 bargaining demands and does not mention the August 23 conversation. The General Counsel has not moved to amend the complaint to allege that this conversation constituted a premature continuing demand effective to create a bargaining obligation upon the hiring of a substantial and representative complement. This was not an oversight. In his brief, the General Counsel affirmatively disavows (G.C. Br. at 6 fn. 5) that the August 23 conversation constituted a demand for recognition, calling the conversation "too remote in time from the actual purchase date to be timely." In the face of the General Counsel's affirmative disavowal of the possibility that the August 23 conversation was a valid continuing bargaining demand, I will not reach the issue. I admit, however, I am less convinced than the General Counsel.[8]

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[8]Testimony on this issue, which was initiated by Respondent, came into evidence without objection. If Gilkison is credited and a bargaining demand found, the timing of the conversation is not an insuperable hurdle. That the conversation occurred prior to the completion of the purchase and assumption of operations is not decisive. See, e.g. *University Medical Center*, 335 NLRB 1318, 1319, 1334 (2001) (bargaining demand made over 7 weeks prior to employer assuming control of predecessor, and prior to final approval of the sale, subsequently attached when a substantial and representative complement of employees was hired), enforcement granted in relevant part, 335 F.3d 1079 (D.C. Cir. 2003); *The Bronx Health Plan*, 326 NLRB 810 (1998) (demand made June 9 was continuing demand where substantial and representative complement hired after July 1 assumption of management by respondent), enfd. 203 F.3d 51 (D.C. Cir. 1999); *Paramus Ford,* Inc., 351 NLRB No. 53 (2007) (demand made 4 days before asset purchase, bargaining obligation attached one week after purchase).

By the August 23 date of this conversation, Ligon had sent a memo to HTI employees (G.C. Exh. 3) explaining its plans for the new business, soliciting employment applications, explaining the process and timeline for hiring, and announcing in significant detail the new wages and benefits it would be implementing upon assumption of the operations. In other words, by August 23, Ligon had availed itself of its right to set new initial terms and conditions and was moving to establish and control the labor relations environment. I am hard pressed to accept that the Union could not avail itself of its right to invoke the continuing demand rule while the successor goes about choosing, interviewing and establishing terms and conditions for the new workforce. It is the precise point of the continuing demand rule to permit a union to act to preserve its bargaining rights in this uncertain situation. See, *Fall River,* 482 U.S. at 53.

In *Fremont Ford Sales, Inc.*, 289 NLRB 1290, 1295 (1988) the Board did suggest a limitation on how premature a valid bargaining demand could be. Although it made no difference to the result in that case, in *Fremont Ford* the Board reasoned that an encounter with the employer that came before the employer was legally or functionally operational was too premature to be the basis for recognition. Instead, the Board found that a second premature demand made before the purported successor had hired any bargaining unit employees, but after the actual takeover of the predecessor had begun, constituted a valid continuing demand. At the time of the second demand, the Board noted that the financing of the new operation and interviewing of employees had begun. Subsequently, in *Bendix Transportation Corp.*, 300 NLRB 1170 fn. 2

Continued

As to the September 12 demand allegations, there is a sharp dispute over what was stated in two conversations, and whether one of the conversations even occurred. Four witnesses testified as to this matter. I can point to no obvious problems with the demeanor of any of them. For the reasons set forth below, I find that the General Counsel has failed to prove that the demands were made. I am not sure that the demands were not made, but my doubts are such that I am unwilling to credit the General Counsel's witnesses.

Thornsberry testified that in the conversation he had in the Galion plant lobby on September 12, no mention was made of a bargaining or recognition request. McMahon testified emphatically that he did not talk to Gilkison on September 12, or anytime after August 23. I found these witnesses were highly believable in their demeanor. McMahon's credibility is bolstered by his frank admission and recall relating to the August 23 conversation. It would be an unusually discriminating witness (well beyond my capability, as indicated in my footnoted discussion above), who could confidently determine that recollection of the August 23 conversation would not be harmful to the interests of Respondent, but would then pretend that a similar conversation on September 12 never occurred.

(1990), the Board rejected the contention that *Fremont Ford* stood for the proposition 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." Contrasting the first demand in *Fremont* from the situation in *Bendix*, the Board explained:

> 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.

Bendix, supra.

In *Williams Enterprise*, 301 NLRB 167 (1991), enfd. denied and remanded in part on other grounds 956 F.2d 1226 (D.C. Cir. 1992), the Board similarly rejected a respondent's effort to have a premature demand ruled invalid based on *Fremont*, pointing out that

> before the Union acted, the Respondent had executed an agreement to purchase the predecessor's assets[,] . . . immediately began accepting employment applications for the plant . . . [and later,] informed [employees] of . . . the working conditions they could expect. In *Fremont*, by contrast, 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 employing entity.

Williams, supra at 167.

In terms of precedent, the question would be whether the situation here is more like *Bendix*, *Williams*, and the second demand in *Fremont*, or more like the initial too-early demand of *Fremont*. There was, it is true, no binding purchase agreement signed by August 23, and no assumption of control. But Ligon was in existence, had served notice of its intent to purchase the Galion facility, and had been named the bankruptcy stalking horse. And, most important, when McMahon and Gilkison spoke on August 23, Ligon had already begun soliciting HTI employees, distributing employment applications, and taking advantage of its right under *Burns* to set initial terms and conditions of employment. Assuming a demand was made on August 23, application of the continuing demand rule would seem warranted under the circumstances. But I am not inclined to reach a theory in favor of the General Counsel that is affirmatively opposed by the General Counsel.

It is true, as the General Counsel presses, that telephone records indicate a 4 minute call was made to Ligon headquarters from the Union late in the morning of September 12. This is a powerful piece of evidence, and Respondent did not come up with a witness to say that he or she was on the phone with the Union that morning. And yet it is, ultimately, circumstantial and limited. The call, placed to the main number does not prove who talked to whom, much less what was discussed. It must be weighed in balance with other circumstantial evidence.

I had no problem with the demeanor of Gilkison or Campbell, who told consistent and corroborating stories about the events of September 12. Yet, given the sharp credibility dispute, I remain unconvinced.

I certainly agree with the General Counsel, and disagree with Respondent: it is not inconsistent for a union to proceed along a representation election path while simultaneously seeking recognition based on the employer's successorship status. But Respondent's point is not so easily dismissed. It is not that the Union went down both avenues, but the manner in which it did so. For instance, it is not the fact that the Union filed a representation petition on September 13, the day after the alleged requests for recognition, but the fact that the petition effectively denied that previous requests for recognition had been made. The Board's representation petition form specifically asks for the date on which a prior request for recognition was made by the union and declined by the employer. The Union answered this on the petition form by stating that the "Petition serves as demand." R. Exh. 1, item 7a. The Government would attribute this, essentially, to one arm of the Union not knowing what the other was doing, but we are not talking about a massive bureaucratic system here. A very small number of union officials were involved in this matter. Gilkison, in particular, had longtime responsibility for servicing this plant and was also involved in the solicitation of authorization cards that were the basis for the representation petition. One would expect the Union's petition to reference any prior request for recognition. In the same vein, but even more troubling, Gilkison's only written demand for bargaining—his October 5 letter to Ligon—makes no reference to the September 12 demand(s). Such a reference would have been natural, and the failure of Ligon to have written back disputing it may have cinched the matter for the Union. But, in fact, no written communication to, or exchanged with, or provided to Ligon (prior to trial) mentions the oral demands of September 12. I accept that Gilkison's explanation is possible. He says that he wrote the October 5 letter on orders from superiors, and presumably he would add, if pressed, he printed it from a form for successor bargaining demands kept on a computer somewhere, and that he put not one moment of thought into customizing the letter to fit the situation presented, including the fact that by October 5 he surely knew that a majority of the employees were no longer former HTI employees. Such detachment is possible. But we are dealing with burdens of proof, and albeit possible, it is far from convincing.[9]

It is also notable that Gilkison and Campbell's alleged conversation with Thornsberry was prompted by an afterthought: the realization over coffee, after passing out authorization cards and while reviewing the list of employees, that an overwhelming majority of the employees (over 80% on September 13) were former HTI employees. The General Counsel contends that the fact of the August conversation makes it more likely that Gilkison requested recognition from McMahon as soon as Ligon's operations began. However, Gilkison's

[9]I note also that the October 5 letter is written to Glenn Campbell at the Galion plant. This is inconsistent with Gilkison's testimony that he contacted McMahon on September 12 because he was directed by Thornsberry to contact Ligon in Alabama regarding all union-related matters.

September 12 demands were not a continuation of a plan to request recognition. That scenario appears to have been abandoned, allegedly renewed only as an afterthought that came to Gilkison sitting in the diner. The spontaneous nature of Gilkison's decision to request recognition accounts for the lack of evidence of an intent to make this demand, but does not add to the trustworthiness of the claim. It does seem possible, as Respondent has suggested, that Gilkison's realization that a bargaining demand was needed came not on September 12 in the diner, but some weeks later when the Union evaluated its election prospects less positively.

In addition, one cannot help but notice that Gilkison's account of McMahon's comments in the September 12 conversation sounds a lot like his account of McMahon's comments in the August 23 conversation. According to Gilkison, in both conversations McMahon responded, "No, sir, not at this time" to Gilkison's requests. McMahon agrees that this was (essentially) his response on August 23. It is possible that McMahon again offered this same response nearly three weeks later. But it is unlikely. More typically, conversations build on and reference one another. (The same doubt is engendered by Gilkison's October 5 letter which, as discussed, is written without reference or acknowledgment of the prior demands allegedly made.) Gilkison may be attributing comments from the August 23 discussion to September 12.

The other pieces of proof relied upon by the General Counsel—Gilkison's printout of materials from the Ligon website from a computer with the date set at September 12, notes of his telephone conversation with McMahon and his letter to another union official, Forgione, detailing his contacts with Respondent, including the September 12 encounter with Thornsberry and McMahon—are powerful if true, and damning if not. Again, they have no external corroboration. The letter to Forgione was "cc'd" to no one. Forgione did not testify. The website printout and the notes were mentioned to no one (as far as the record reveals).[10]

This is not an easy case. I was presented with four witnesses with no obvious problems in demeanor, but the two stories are not reconcilable. The Union's story, however, is more complicated, requires more explanation and in the end, given all the circumstances and the excellent demeanor of McMahon and Thornsberry, is less likely. The Union may be the victim here of its own informality and missteps, and my misreading of the situation, but the burden of proof lies with the General Counsel and I find that this burden has not been met here. I find that no recognition or bargaining demand was made on September 12.

Accordingly, the first proven demand for recognition was made on October 5. At that time the majority of the employee complement was no longer composed of former HTI employees. As discussed, above, pursuant to the reasoning of *Royal Midtown Chrysler*, by October 5 the successor's obligation to recognize and bargain with Union upon demand had come and gone. I will recommend dismissal of the complaint.[11]

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[10]The notes seem a tad unusual to me. According to Gilkison, moments before calling McMahon for the purpose of seeking recognition he wrote a note to remind himself to "[c]all Mr. McMahon" and "see if he will recognize the IAM&AW Union."

[11]In light of my findings and conclusions, it is unnecessary to consider Respondent's contention that, assuming the September 12 conversations occurred as alleged by the General Counsel, the conversations were inadequate to serve as valid bargaining or recognition demands.

Conclusions of Law

Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 11, 2008

David I. Goldman
U.S. Administrative Law Judge

[12]If 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.