Road & Rail Services, Inc. *and* Automobile Transport Chauffeurs, Demonstrators and Helpers, Local Union No. 604, affiliated with International Brotherhood of Teamsters[1] and Shopmen's Local 518, Party to the Contract. Cases 14–CA–27983 and 14–CA–28026

November 30, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On March 7, 2005, Administrative Law Judge George Carson II issued the attached decision. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, cross-exceptions, and a motion to strike the Charging Party's exceptions,[2] and the Charging Party filed a memorandum in opposition to the Respondent's motion.

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,[3] and conclusions and to adopt the recommended Order as modified.[4]

The main issue presented here is whether the judge properly dismissed the complaint allegations that the Respondent, a successor employer,[5] violated Section 8(a)(2) and (3) of the Act by recognizing the Union and entering into a collective-bargaining agreement with it prior to the hiring of the Respondent's work force and the commencement of its operations. The judge found that the Respondent was a "perfectly clear" successor within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and subsequent Board precedent. As a "perfectly clear" successor, the judge reasoned, the Respondent did not violate Section 8(a)(2) and (3) by recognizing and bargaining with the Union and executing a contract memorializing the terms and conditions of employment for the unit employees. We agree.

In affirming the judge's decision, we emphasize that the Respondent never expressed any intention to invoke the right of an "ordinary" *Burns* successor to establish its own initial terms and conditions of employment. Instead, shortly after obtaining the contracts to perform the work in question, the Respondent expressed its clear intention to staff the facilities with the predecessor's employees and to bargain with the employees' designated representative, thereby securing a skilled and experienced work force and avoiding the uncertainty of attempting to recruit new employees based on unilaterally established employment terms. Thereafter, the Respondent did not, in fact, unilaterally set initial terms, but instead met with the Union for the purposes of collective bargaining and executed a contract that included the initial terms to be effective the date the Respondent was to begin operations. When it commenced operations, the Respondent did so with a work force of 23 employees, 20 of whom (87 percent) worked for its predecessor immediately before the takeover.[6] At no point during the parties' negotiations or these proceedings was there ever evidence of a loss of majority support for the Union or evidence that the negotiations were anything other than bona fide, arm's-length dealings between the parties. With particular emphasis on these facts, we agree with the judge that the Respondent was a "perfectly clear" successor within the meaning of *Burns*.

Facts

The Respondent cleans and prepares railroad cars used to transport newly manufactured vehicles for the automotive industry. In March 2004,[7] the Respondent was awarded the contracts to perform cleaning and preparation work at a number of Norfolk Southern Railroad facilities, including facilities in Wentzville, Missouri; Hazelwood, Missouri; and Venice, Ohio—the only three locations at issue.

The work at these facilities had previously been performed by Caliber Mechanical Prepping, Inc. (Caliber). Caliber's cleaning and preparation employees had been

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] The Respondent has moved to strike the Charging Party's exceptions on the grounds that they do not comply with Sec. 102.46(b) of the Board's Rules and Regulations. We deny the Respondent's motion because the Charging Party's exceptions adequately set forth the findings and conclusions to which the Charging Party has excepted.

[3] The 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.

We correct the judge's inadvertent error in finding that the Respondent's threat to terminate employees who did not execute dues-checkoff authorizations violated Sec. 8(a)(1) and (3) of the Act. The threat violated Sec. 8(a)(1) only.

[4] We shall modify the judge's recommended Order to conform to the Board's standard remedial language. We shall also substitute a new notice.

[5] There were no exceptions to the judge's findings that there was a "substantial continuity" of operations between the Respondent and its predecessor and that the Respondent is a successor employer.

[6] An additional employee hired by the Respondent was a former employee of the predecessor, but was not working for the predecessor at the time of the takeover.

[7] All dates hereafter are in 2004.

represented for purposes of collective bargaining by Shopmen's Local 518 (the Union). At the time that the Respondent took over for Caliber, there was a collective-bargaining agreement in effect between Caliber and the Union that governed the employees' terms and conditions of employment.

On April 15, the Respondent met with the Union's business manager, Duane Raab. During this meeting, the Respondent orally informed Raab of its intention to staff the Wentzville, Hazelwood, and Venice facilities with Caliber's existing employees. In response, Raab requested that the Respondent recognize the Union, and the Respondent agreed to do so. Afterward, the Respondent stated that it "desired to negotiate changed terms and conditions of employment" from those existing under the Caliber collective-bargaining agreement. At no time during this meeting did the Respondent announce that it was setting new terms and conditions of employment, or give any indication that it planned to unilaterally set new terms in the future.

On May 10, the Respondent sent a letter to the Union confirming its "intention to retain a substantial portion of the complement of those employees you presently represent" at the three locations. As before, the Respondent gave no indication that it planned to unilaterally set new terms and conditions of employment. Instead, the Respondent acknowledged an obligation to recognize the Union and emphasized its desire to quickly reach a mutually acceptable agreement on terms and conditions of employment. Thereafter, on May 19, the Respondent solicited applications from all Caliber's existing cleaning and preparation employees.

The Respondent and the Union commenced bargaining on May 13. On June 14, the parties finalized their negotiations and executed a collective-bargaining agreement that was to become effective July 10, the date the Respondent planned to begin work at the Wentzville location. As the judge found, the terms of the new collective-bargaining agreement were substantially similar to those that had existed under the Caliber agreement.[8]

The Respondent made offers of employment to the Caliber employees about a week before commencing operations at each of the three facilities. The Respondent began work at Wentzville on July 12, at Hazelwood on July 26, and at Venice on July 31. Of the 23 employees the Respondent hired to staff the three facilities, 20 had been employed by Caliber immediately before the Respondent commenced operations.

Discussion

In *NLRB v. Burns Security Services*, supra, the Supreme Court stated that although a successor "is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294. As further explicated by the Board, the "perfectly clear" caveat, while restrictive, should apply "to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . *has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment*." *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975) (emphasis added).

The particular circumstances of the present case bring it within the *Burns* "perfectly-clear" caveat. The Respondent clearly informed the Union of its intent to staff the three facilities with Caliber's existing employees, which, in fact, it did. At the same time, the Respondent gave no indication that it intended to invoke a right to unilaterally establish initial terms and conditions of employment. Although the Respondent indicated a desire to make some changes to the existing employment terms, the Respondent repeatedly made clear that it intended to negotiate any such changes with the Union.[9] Again, in fact, that is precisely what the Respondent did: it did not unilaterally set any initial terms, but instead negotiated an agreement with the Union, which was in effect at the time employees were to report to work. Accordingly, this is not a case where the employees' continued employment was contingent on their acceptance of a successor's unilateral changes to their employment terms. In

[8] The employees' hourly wage remained the same, as did the employees' health insurance contributions. One difference was that the employees had received 4 holidays and 7 personal days with Caliber, while under the new agreement the employees would receive 7 holidays but no personal days.

[9] In his decision, the judge placed considerable weight on the Respondent's notification to the Union that it "*desired to negotiate* changed terms and conditions of employment." (Emphasis in the judge's decision.) In adopting the judge's decision, we express no view on the question whether such a statement, without more, would necessarily dictate a "perfectly clear" finding in every case. In this case, of course, the Respondent does not contend that it was free to unilaterally establish terms and conditions of employment. We also note that the applicability of the "perfectly clear" successor doctrine largely "'rests in the hands of the successor.'" *Canteen Corp. v. NLRB*, 103 F.3d 1355, 1364–1365 (7th Cir. 1997), quoting *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41 (1987).

these circumstances, we agree with the judge that the Respondent was a perfectly clear successor and, therefore, did not violate the Act by recognizing and bargaining with the Union prior to hiring employees and commencing operations.[10]

Our dissenting colleague misinterprets the Respondent's statements about negotiating with the Union over any changes in the employees' terms and conditions of employment as equivalent to a clear statement of the Respondent's intention to set new terms and conditions of employment. The two types of statements are fundamentally different. The Respondent's statements, unlike our colleague's interpretation of them, contain no mention or reservation of the right to act unilaterally—the basic right assured to *Burns* successors. Indeed, the more reasonable interpretation of the Respondent's repeated expressions of its desire to negotiate with the Union is that the Respondent had rejected unilateral action. As a result, we find that the present case is distinguishable from *Spruce Up*, supra, where the employer "made it clear from the outset that he intended to set his own terms." 209 NLRB at 195.

The dissent claims that under the "analytic test" of *Spruce Up* "it makes no difference whether the changes are unilateral or negotiated." We disagree. The *Spruce Up* test focuses on gauging the probability that employees of the predecessor will accept employment with the successor. 209 NLRB at 195. Where, as here, a successor commits to conducting its hiring from the predecessor's work force and announces that any changes to initial terms are to be made not unilaterally but only through negotiation with the employees' designated bargaining representative, there is a much greater likelihood that employees will choose to remain with the successor because they have a voice, through their representative, in establishing the terms and conditions under which they will work.[11] Moreover, a successor's decision to negotiate changes in employment terms with the employees' representative leaves intact one of the employees' most important employment "terms"—the process of collective bargaining itself—and the "industrial peace and stability" fostered by that process. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785–786 (1996). This atmosphere of stability naturally enhances the probability that employees of the predecessor will stay on with the successor. For one thing, the employees' existing employment terms may remain in place for some time before any changes are made. See, e.g., *Elf Atochem North America, Inc.*, 339 NLRB 796 (2003) (employer was a "perfectly clear" successor where it announced its intention to hire the predecessor's employees and to maintain their employment terms while negotiating with their union).[12] In addition, the employees will have an opportunity, through their union, to have the successor consider their interests and concerns before changes actually occur. These stabilizing factors, which are absent when a successor undertakes unilateral action, tend to temper the uncertainty occasioned by a change in ownership. In such circumstances, there simply is less reason to assume that employees of the predecessor will refuse to work for the successor. Indeed, 20 of the 23 employees who accepted employment with the Respondent worked for its predecessor immediately prior to the takeover.[13]

Finally, the dissent's contrary construction of the *Burns* caveat is inconsistent with the very language of that case. In *Burns*, the Supreme Court recognized that there will be instances "in which it will be appropriate" to have the successor "initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294. This language plainly contemplates situations in which a successor will discuss with the employees' union proposed changes in initial terms and conditions of employment. However, under the dissent's interpretation of the *Burns* caveat, the moment the suc-

[10] Cf. *Hilton's Environmental, Inc.,* 320 NLRB 437, 438 (1995) ("perfectly clear" successor status established where employer's entire course of conduct indicated that the Respondent did not intend to unilaterally establish new terms and conditions of employment); *Canteen Co*., 317 NLRB 1052, 1052–1053 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997) (employer was a "perfectly clear" successor where it announced its intention to retain the predecessor's employees and then began negotiating with the employees' union); *C.M.E., Inc.,* 225 NLRB 514 (1976) (employer was a "perfectly clear" successor where it told union representatives that it intended to rehire all of its predecessor's employees and, although contract changes were discussed, no conclusions were reached).

[11] Our dissenting colleague asserts that negotiations with a nonmajority union are inconsistent with the right of employees to choose or reject union representation. Here, however, the predecessor's employees freely exercised that right and had designated the Union as their collective-bargaining representative. As noted above, at no point during the parties' negotiations or these proceedings was there ever evidence of a loss of majority support for the Union. Thus, our colleague's professed concern is misplaced in the context of this case.

[12] Although the Respondent did not explicitly state that it would maintain the former Caliber employees' existing terms and conditions of employment while it negotiated with the Union, as the employer did in *Elf Atochem*, this was implicit in its repeated statements seeking agreement with the Union.

[13] Contrary to our dissenting colleague, it is not speculative to consider various factors that are reasonably likely to raise, or lower, the probability that a predecessor's employees will accept employment with a successor. The perfectly-clear successor caveat inherently demands an inquiry into the "degree of likelihood that incumbents will work for the successor." *Machinists v. NLRB,* 595 F.2d 664, 673 fn. 45 (D.C. Cir. 1978). In addition, the fact that the Respondent was able to satisfy its staffing needs almost exclusively with incumbent employees of course is not determinative, but it surely provides some indication that the factors considered above are not speculative.

cessor discusses such changes with the union, the caveat becomes inapplicable and the successor commits an unfair labor practice. This construction subverts an elemental purpose of the caveat: to provide for a discussion between a successor employer and the employees' representative when it is the successor's announced plan to retain the unit employees.

Accordingly, for these reasons, we affirm the judge's finding that the Respondent's conduct did not violate Section 8(a)(2) or (3) as alleged.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Road & Rail Services, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its facilities in Wentzville and Hazelwood, Missouri, and Venice, Illinois, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 7, 2004."

2. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN, BATTISTA, dissenting in part.

Contrary to my colleagues, I find that the Respondent violated Section 8(a)(2) and (3) by recognizing the Union and entering into a collective-bargaining agreement with it prior to hiring any of the predecessor employer's employees.

The Respondent is engaged in the cleaning and preparation of railroad cars. Prior to July 2004, Caliber Mechanical Prepping, Inc. (Caliber) and the Union were parties to a collective-bargaining agreement under which the Union was recognized as the exclusive representative of all hourly Caliber employees performing railroad cleaning and preparation work at three St. Louis area locations.[1] In March 2004,[2] the Respondent was awarded the contracts at these three facilities (Wentzville, Hazelwood, and Venice).

The Respondent and the Union met on April 15. During this meeting, the Respondent informed the Union that it "inten[ded] to staff . . . these . . . three facilities . . . with the existing employees," and that it desired to negotiate different terms and conditions of employment than those in the Union-Caliber collective-bargaining agreement.

On May 10, the Respondent wrote the Union, confirming its intentions of retaining a substantial portion of predecessor employees and negotiating a new agreement prior to commencing operations at the facilities.[3] Negotiations commenced on May 13. While the Respondent and Union were engaged in negotiations, the predecessor employees were permitted to submit employment applications to the Respondent on May 19. On June 14, the Respondent and the Union executed a collective-bargaining agreement, set to take effect on July 10, the date on which the Respondent was scheduled to commence operations at the first of the three facilities.

The Respondent hired the Wentzville employees on July 12, the Hazelwood employees on July 26, and the Venice employees on July 31. At the end of July, the Respondent's combined work force at the three facilities consisted of 20 of the predecessor's employees and 3 employees who had never worked for Caliber.

Under these facts, it is evident that the Respondent commenced bargaining with the Union before it was clear that the Union would have majority status. At the time of the negotiations, i.e., beginning on May 13, it was not clear whether the Union would be the representative. As of that time, given the Respondent's announced intention to change terms and conditions of employment, it was unclear how many predecessor employees would apply. Indeed, employees were not even permitted to apply before May 19. Thus, the Respondent was negotiating with the Union at a time when the Union's majority status was not established, actually or prospectively. It is axiomatic that a nonconstruction employer violates Sec-

[14] If 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."

[1] The three facilities constituted one bargaining unit.

[2] All dates hereafter refer to 2004.

[3] The Respondent's operation would be somewhat smaller, and thus some predecessor employees would not be retained.

tion 8(a)(2) if it negotiates with a union at a time when that union does not have majority status.[4]

Contrary to the majority's assertion, I recognize that, under the "*Burn's* caveat," there can be circumstances where a successor employer can negotiate with the predecessor union, even before employees begin work. Thus, if the successor employer makes clear its plans to retain the predecessor's employees as his work force, and does not indicate that there will be changes in terms and conditions of employment, it may well be "perfectly clear" that the new employer will be a successor, and it may be appropriate to negotiate with the predecessor union, even before employees begin work.[5] However, where the matter is not "perfectly clear," a different result obtains. As the Board stated in *Spruce Up*, 209 NLRB 194, 195 (1975):

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer 'plans to retain all of the employees in the unit,' as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one.

In the instant case, when the Respondent announced its intention to hire the predecessor's employees it simultaneously expressed its intention of changing terms and conditions of employment. As noted above, on April 15, the Respondent informed the Union that it desired to negotiate different terms and conditions of employment than those that were in the Union's collective-bargaining agreement with Caliber. There is no evidence that the predecessor's employees would in fact go to work for the Respondent under changed terms and conditions of employment. Thus, when the Respondent began negotiating with the Union, it was not clear that the Union would have majority status.[6]

The majority acknowledges that the Respondent told the employees that it contemplated changes in terms and conditions of employment. However, for my colleagues, it is significant that the Respondent said that such changes would be negotiated. I disagree. The significance of contemplated changes is that they render uncertain whether the predecessor employees will accept an employment offer made by the Respondent, where the terms and conditions will differ from those that the employees enjoyed under the predecessor. In that fundamental sense, it makes no difference whether the changes are unilateral or negotiated.

The majority misses the central point that, under either unilateral or negotiated changes, there is no way of knowing whether the predecessor's employees would in fact work for the Respondent. My colleagues speculate that employees are more likely to accept employment by the new employer if they are told that changes will be negotiated with their union. There is no evidence to support this speculation. It may be that an employee is willing to accept an adverse change in employment terms if that change has been negotiated with the union, but it may also be that some employees are more interested in the substantive terms offered by the new employer, as distinguished from the manner in which these terms come about. In short, my colleagues rely upon pure speculation.[7]

My colleagues also say that the Respondent made it clear that the predecessor's terms would remain in effect pending negotiations with the Union. Again, this is pure speculation.

My colleagues appear to say that an employer's plan to offer employment to the predecessor's employees permits that employer to negotiate any changes with the union. However, until those new terms are set, and the predecessor employees accept employment under those terms, it is not perfectly clear that the Union will remain the majority representative. Negotiations with a nonmajority union are inconsistent with the right of employees to choose or reject union representation. Accordingly, in terms of the analytic test, it is not "perfectly clear" that predecessor employees will be in the unit under the successor. Thus, recognition of the Union, prior to hire, is premature.

My colleagues say that the Union ultimately did acquire majority status, inasmuch as the predecessor's employees ultimately constituted a majority of the Respondent's work force. However, my colleagues' point misses the mark. The issue is whether the Respondent

[4] *Ladies Garment Workers (Bernard Altman Corp.) v. NLRB*, 366 U.S. 731 (1961).

[5] *NLRB v. Burns Security Service*, 406 U.S. 272, 294–295 (1972).

[6] Compare *Canteen Co*., 317 NLRB 1052 (1995), where the employer announced its intention to hire the predecessor employees, and did not say at that time that it intended to change terms and conditions of employment. In that case, there was an obligation to bargain as of the date of the announcement.

[7] My colleagues cite *Machinists v. NLRB*, 595 F.2d 664 (1978). That case actually supports my position. The court there made it clear that a change from the predecessor's terms creates the "possibility" that the predecessor employees may not wish to be employed by the successor. Thus, it is not "perfectly clear" that they will work for the successor. The sentence that is partially quoted by my colleagues, when read in full, says that there may not be that perfect clarity even if the successor offers the same terms as those of the predecessor. I need not go that far. The Respondent's terms here differed from those of the predecessor.

could lawfully negotiate with the Union *before* the employees were hired and therefore *before* the Union obtained majority status.

Similarly, my colleagues misstate my position. I do not say that the Respondent committed a violation where it "expresses a desire" to negotiate changes with the Union. Rather, the violation occurred when the Respondent actually negotiated those changes, a time when the Union did not have majority status.

Under these circumstances, I find that the Respondent was not a "perfectly clear" successor. Accordingly, I find that the Respondent violated Section 8(a)(2) by prematurely recognizing the Union. It also violated Section 8(a)(3) because the negotiated agreement contained a union-security clause.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with termination if you do not fulfill your obligation to tender dues to Shopmen's Local 518 by executing dues check-off authorizations.

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.

ROAD & RAIL SERVICES, INC.

Paula B. Givens, Esq., for the General Counsel.
James N. Foster Jr., Daniel R. Begian, and *Geoffrey M. Gilbert, Esqs.,* for the Respondent.
Mark Potashnick, Esq., for the Charging Party.
Jeffery E. Hartnett, Esq., for the Party to the Contract.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in St. Louis, Missouri, on January 10 and 11, 2005, pursuant to a consolidated complaint that issued on November 22, 2004.[1] The complaint, as amended on December 20 and at the hearing, alleges threats of discharge to employees if they did not sign dues check-off authorizations in violation of Section 8(a)(1) of the National Labor Relations Act and the unlawful recognition of, and maintenance of a contract with, Shopmen's Local 518 thereby unlawfully assisting the Union in violation of Section 8(a)(2) of the Act, and encouraging membership in that labor organization in violation of Section 8(a)(3) of the Act. The Respondent's answer denies all violations of the Act. I find that the recognition of, and maintenance of a contract with, Shopmen's Local 518 did not violate the Act. The Respondent did, on one occasion, threaten termination for failure to execute dues check-off authorizations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Road & Rail Services, Inc., is a Kentucky corporation headquartered in Louisville, Kentucky, engaged in the cleaning and preparation of railroad cars to transport newly manufactured automobiles at various locations including three locations in the vicinity of St. Louis, Missouri, the only location involved in this proceeding. The Company, in conducting its business, annually provides services valued in excess of $50,000 directly to customers located outside the State of Kentucky. The Company admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Automobile Transport Chauffeurs, Demonstrators and Helpers, Local Union No. 604, affiliated with International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

The Respondent admits, and I find and conclude, that Shopmen's Local 518, affiliated with International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Alleged Unlawful Recognition

1. Facts

This proceeding involves employees who work at three St. Louis area locations at which the railroad cars that they clean and prepare for the shipment of new vehicles are located. General Motors' vehicles are assembled and shipped from Wentzville, Missouri, and Ford vehicles are assembled and shipped from Hazelwood, Missouri. Daimler Chrysler products are assembled at Fenton, Missouri, and transported by truck across the Mississippi River to Venice, Ohio, from which they are

[1] All dates are in 2004 unless otherwise indicated. The charge in Case 14–CA–27983 was filed on August 16, and was amended on November 17. The charge in Case 14–CA–28026 was filed on September 20, and was amended on November 8.

shipped by railroad. Prior to July 2004, the cleaning and preparation of the railroad cars at these locations was being performed by employees of Caliber Mechanical Prepping, Inc. (Caliber). Caliber performed this work pursuant to a contract with Norfolk Southern Railroad. Caliber and Shopmen's Local 518 were party to a collective-bargaining agreement recognizing the Union as the exclusive collective-bargaining representative of all hourly employees at the foregoing three locations that was effective by its terms from January 14, 2002, through January 31, 2007.

On January 12, Norfolk Southern issued a request for proposals to perform the cleaning and preparation work at 19 locations that it served. Road & Rail was performing this work at 6 of the locations, and, on March 31, obtained the contracts to perform this work at all 19 locations. Road & Rail's Vice President Robert Armine explained that the rebidding occurred in connection with an industrywide change pursuant to which the contractors would be paid a flat rate for each railroad car cleaned and prepared for loading, rather than an estimate of the number of hours of work that needed to be performed based upon Norfolk Southern's estimate of the number of railcars at a particular location. Of the 19 locations at which Road & Rail obtained the contracts, 14 were unionized.

The prebid documents provided to Road & Rail reported that the employees were represented by Iron Workers Local 518, actually Shopmen's Local 518. On April 6, Attorney James N. Foster, counsel for the Respondent, contacted Duane Raab, business manager of Shopmen's Local 518, to confirm that it did represent the employees of Caliber and to determine whether there was an existing collective-bargaining agreement. On April 15, Vice President Armine and Attorney Foster met with Business Manager Raab. Armine stated that it was Road & Rail's "intention to staff . . . these three facilities . . . with the existing employees." Business Manager Raab requested that Road & Rail recognize Shopmen's Local 518, and Armine agreed to do so. Road & Rail informed the Union that it "desired to negotiate changed terms and conditions of employment from those existing under the Caliber . . . collective bargaining agreement." Thereafter, on May 10, Armine wrote Raab stating, in pertinent part:

> Following our meeting of April 15, 2004, I am forwarding this letter to you to confirm the fact that it is our intention to retain a substantial portion of the complement of those employees you presently represent at those locations we have sought contractually. As a condition of further employment, however, we recognize that we have an obligation [to] recognize the Iron Workers union as the exclusive collective bargaining agreement in that regard.
>
> Obviously the sooner we can reach agreement, the sooner copies of the agreement can be prepared and distributed to those employees in advance of our assumption of operation date which is tentatively set for early July 2004.

Raab responded by letter dated May 11:

> I received your correspondence dated May 10, 2004. I am available over the next several weeks on Thursday, May 13th and May 20th to meet and begin negotiations in regard to an agreement concerning those employees whom you intend to retain as well as those which you intend to hire at locations in St. Louis where the Iron Workers presently have a collective bargaining agreement. We appreciate this good faith effort on your part and also appreciate the effort on your part to reach an agreement in an expeditious manner to ensure the rights of those employees we represent. If you have any questions please do not hesitate to call me as well.

Armine and Foster met again with Raab on May 13 for 2 or 3 hours. Road & Rail presented Raab with a contract that the company had typically used, and Raab presented the Shopmen's contract. Thereafter, Attorney Foster and Raab met "for purposes of collective bargaining" on June 9, 11, and 14. On June 14, Road & Rail and the Union executed a collective-bargaining agreement effective July 10, the date that Road and Rail was to begin work at the Wentzville location. The basic terms of employment were not changed. The hourly wage for "preppers" remained at $9.55 per hour and the employee contribution for health insurance remained the same, 20 percent. The record does not establish whether the total premiums for the coverage provided by Road & Rail differed from the costs under Caliber. Caliber gave four holidays, Thanksgiving, Christmas Eve, Christmas Day, and New Years Day plus 7 personal days, a total of 11. Road & Rail gave 7 holidays but no personal days. Although the brief of the Charging Party lists drug testing and the requirement that employees have a driver's license as a change in conditions of employment, section 24.2 of the contract between Caliber and Shopmen's Local 518 establishes that Caliber employees were subject to drug testing and employee Edward Morton testified that employees had "to be able to drive."

David Lawshe, area manager for Road & Rail, coordinated the hiring of employees. All Caliber employees were given the opportunity to submit applications on May 19, and, of the 43 individuals employed by Caliber, 38 did so. Actual offers of employment were not made until about a week before Road & Rail assumed the operations at the separate St. Louis area locations. Wentzville employees were hired on July 12, Hazelwood employees began on July 26, and Venice employees began on July 31. The employees were not advised of the terms and conditions of their future employment when they submitted applications. They were informed that Road & Rail would require them to take a drug test and would perform a background check. When employee Darrell Essex filled out his application he asked the Road & Rail representative "about benefits and insurance, . . . vacation and stuff like that." The representative replied that "he didn't know." Essex asked whether Road & Rail would "hire back all employees from Caliber" and was told that, although there was no guarantee, "we would get first consideration at the job before they put an ad in the paper, . . . that, in order to get the job, we would have to pass . . . a background test and a drug screen." No advertisements for these positions were ever placed.

Vice President Armine explained that the background check was a motor vehicle record check to assure that all applicants correctly reported any violations and to assure that all had a valid driver's license. Employee Edward Morton confirmed

that possession of a valid driver's license was a job requirement with Caliber, "we have to be able to drive," and that the employees at Hazelwood, where he worked, were specifically told that that they needed to take care of any problem with a "suspended license or anything like that." Section 24.2 of the contract between the Union and Caliber provided that Caliber had the right to "formulate and enforce programs consistent with the 'Drug Free Workplace Act'" and would require preemployment drug tests. Armine testified that Road & Rail had the same preemployment requirements at all its locations, that "Caliber's . . . hiring policies . . . were very similar to ours," and that he, therefore, "had a high degree of confidence" that the Caliber employees would meet the foregoing prerequisites for employment. Road & Rail followed the same procedure that it followed in St. Louis at the other locations where it obtained the Norfolk Southern contract, including locations where employees were represented, one of which was at Wayne, Michigan, where the employees are represented by a Teamsters local.

Area Manager Lawshe admitted that some Caliber employees were found not to be qualified for employment with Road & Rail. Employee Darrell Essex asked Supervisor Parnell Walker why four individuals whom he named had not been hired, and Walker told him that two had failed the drug test and the two others had invalid driver's licenses. Essex testified that Walker said that he received his information from Supervisor Bob Murphy, but Murphy denied knowing the reason for rejection or giving such information to Walker. Walker did not testify. Whether true or not, I credit Essex that he was told that the four employees had failed.

Vice President Armine explained that Road & Rail planned to reduce staffing at the Norfolk Southern facilities that it had previously served as well as at the ones it had obtained and that this was dictated by pricing because Norfolk Southern would be paying only for cars cleaned rather than for estimated hours on the basis of projected volume. Caliber had operated with 45 employees. Road & Rail staffed the locations with 23 employees. Two Caliber employees, Parnell Walker at Hazelwood and Kenneth Tourville at Venice, were hired as supervisors by Road & Rail. At Wentzville, instead of the 19 employees working for Caliber, Road & Rail hired 12, 11 of whom had been working for Caliber. At Hazelwood, instead of 21 employees, 8 were hired, 6 of whom had been working for Caliber, plus Walker who had been an employee but was hired as a supervisor. Of the two employees hired at Hazelwood who were not working for Caliber, one had worked for Caliber in the past. At Venice, instead of the five employees working for Caliber, three employees were hired, all of whom had been working for Caliber, plus Tourville who had been an employee but was hired as a supervisor. As the above totals reflect, 20 of the 23 employees hired by Road & Rail, plus two new supervisors, had been working for Caliber immediately prior to Road & Rail commencing operations.

On July 12, the day Road & Rail hired employees at Wentzville, Area Manager Lawshe informed the employees that they continued to be represented by Shopmen's Local 518, that "they were still in the same union that they had [been] with Caliber." Employees signed a receipt for the associate handbook that they received. The receipt acknowledges that the employee understands that "the terms and conditions of my employment are as set forth in the collective bargaining agreement between the company and the union" and that the handbook does not alter those terms "unless specifically set forth." Lawshe recalled that, on July 12, former employee Larry Vincent complained that "their representative wasn't answering their calls." Lawshe suggested that the employees go to the next union meeting. Vincent did not state that the Wentzville employees did not want to be represented by Shopmen's Local 518.

Vincent testified that, as early as May, employees at Wentzville expressed dissatisfaction with the representation that they were receiving from the Union, but he did not state the basis for their dissatisfaction. Vincent recalled that, after he was hired by Road & Rail, Supervisor Steve Mills advised employees that they needed to elect a shop steward. In a pretrial affidavit, Vincent stated that this occurred on July 13 and that, on that date, the employees "deliberated and decided they wanted to vote Local 518 out." He admitted that there was no communication with any supervisor or manager regarding any employee dissatisfaction.

On July 21, Vincent attended a Shopmen's Local 518 meeting and, at that meeting, informed Local 518 President Mark McGilvray that "we were dissatisfied with their representation and that we had vote[d] them out." There is no evidence of a formal vote. Regardless of when the dissatisfaction with Shopmen's Local 518 among the Wentzville employees was first expressed, there is no evidence that it was expressed to the Union prior to July 21. There is no evidence that a desire not to be represented by Shopmen's Local 518 or any reference to a vote by the Wentzville employees was ever communicated to the Respondent. Employee Vincent had no contact with the Teamsters Union until August 11 or 12.

Employees Edward Morton and Darnell Essex, notwithstanding contradictory recollection of the dates, place themselves together in two conversations among second-shift employees at Hazelwood while Parnell Walker was present in the same 30-by-20 foot room doing paperwork. The employees discussed dissatisfaction with Shopmen's Local 518. The same five or six employees, including Morton and Essex, were involved in both conversations, the first of which occurred prior to Walker being hired as a supervisor by Road & Rail on June 28. Walker went to training in Kentucky and returned on July 3. During the week of July 5–8, when Hazelwood was still being operated by Caliber, Walker worked at Wentzville as a supervisor on first shift and then worked for Caliber as an employee for 29 hours. The second conversation occurred after Walker returned from training and would have occurred between July 5 and 8. After the second conversation, Essex spoke alone with Walker, stating that the employees did not want to be represented by Shopmen's Local 518. Walker replied that Essex needed to get in touch with Shopmen Business Agent Raab before the St. Louis area employees "missed out on better pay, benefits, [the cleaning of] uniforms . . . things like that that they had at other facilities." Essex made no effort to contact the Union. Morton testified that he also spoke separately to Walker. When initially asked what he told him, Morton answered, "Just that none of us

wanted the Union." I do not credit his later embellishment of this testimony.

Essex recalled that Walker was at the same table as the employees when the first conversation occurred. I find that he was mistaken in this regard. The fact that both he and Morton spoke directly to Walker establishes that neither was certain that Walker either overheard the conversations among the second-shift employees or understood any comments to mean that the employees did not want to be represented by the Union rather than that they disagreed with some union action or inaction. Walker did not testify. I find that Essex and Morton did tell Walker that the employees did not want to be represented by the Union. There is no probative evidence that their comments related to any employees other than the five or six second-shift employees at Hazelwood.

After being hired by Road & Rail on July 26, Essex called Teamsters Local 604 on July 27. After speaking with a Teamsters' representative, Essex began soliciting authorization cards on behalf of that Union on August 2. Teamsters Local 604 filed a petition for an election in a unit consisting of 10 employees, presumably the Hazelwood location, on August 11. A separate petition for the Wentzville location was filed on August 16. When Local 604 learned that the petitions were being dismissed because of Road & Rail's collective-bargaining agreement with Shopmen's Local 518, the Teamsters representative advised Essex of this fact.

Essex contacted President McGilvray on August 23, who confirmed that there was a contract. McGilvray testified that he provided a copy of it from his file to Essex. Essex acknowledges receipt of the contract but testified that it was not immediately provided because it had been sent to Washington D.C. for approval by the International Union. Counsel for the Charging Party questioned President McGilvray regarding the requirement of approval by the International Union as reflected on 4 pages of its constitution and bylaws.[2] The Charging Party's brief does not mention this matter presumably because the Charging Party is aware that the Board holds that approval by an international union "as to form" is "merely a perfunctory or ministerial act" and that "an otherwise valid agreement will be binding on the parties regardless of whether the approval is actually secured." *Buschman Co.,* 334 NLRB 441, 443 (2001).

2. Analysis and concluding findings

The complaint alleges that the Respondent granted recognition to, and maintained a contract with the Union "even though Shopmen's Local 518 did not represent a majority of the Unit" and "even though Respondent had yet to employ any Unit employees or commence normal business operations" thereby assisting the Union in violation of Section 8(a)(2) of the Act and encouraging membership in the Union in violation of Section 8(a)(3) of the Act.

There is no evidence that the Union did not represent a majority of the unit employees at any time. Prior to Road & Rail's commencement of operations, all hourly employees of Caliber at the three St. Louis area locations were represented by the Union pursuant to a contract that contained a valid union security provision. Road & Rail hired its entire employee complement prior to August 1. The only evidence of disaffection of any employees with Shopmen's Local 518 prior to their employment by the Respondent is the statements by employees Essex and Morton during the last week that they worked for Caliber at the Hazelwood location. Essex and Morton, who had been conversing with the three or four other second-shift employees, informed Parnell Walker, who was still working on second shift for Caliber at Hazelwood, that the employees did not want to be represented by Shopmen's Local 518. Accepting that statement as an expression of disaffection rather than dissatisfaction, it related to a maximum of six employees out of Caliber's total complement of 21 employees at Hazelwood. No employee had contacted Teamsters Local 604. At Wentzville, where the Respondent hired 11 employees on July 12, employee Vincent, after being hired, informed Area Manager Lawshe that "their representative wasn't answering their calls." Vincent acknowledged that he made no statement to any manager or supervisor of the Respondent regarding a desire not to be represented by Shopmen's Local 512. Expressions of dissatisfaction with the actions of a collective-bargaining representative do not establish disaffection. *Torch Operating Co.*, 322 NLRB 939, 943 (1997).

The merit of the complaint allegation relating to recognition of the Union prior to commencement of operations is dependent upon the status of the Respondent as a "perfectly clear" successor under the principles enunciated in *NLRB v. Burns Security Service*, 406 U.S. 272 (1972), and subsequent Board precedent. The first issue to be determined is whether the new employer is, in fact, a successor. Although the parties did not stipulate that the Respondent was a successor to Caliber, they did stipulate, and the record establishes, that the Respondent employed more than 90 percent of Caliber's employees, that those employees perform the same jobs, using the same tools and equipment, in the same working conditions, and are subject to similar supervision as when they were employed by Caliber. The parties further stipulated that the Respondent performed services substantially similar to those provided by Caliber to Norfolk Southern, the same entity for which Caliber had performed the services. I find a "substantial continuity" of operations. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987). The Respondent is a successor to Caliber.

The Supreme Court, in *NLRB v. Burns Security Service*, supra, held that, although a successor "is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is *perfectly clear* that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Id. at 294. (Emphasis added.) The Board, applying *Burns*, holds that a successor's obligation to bargain commences when the successor announces its intention to retain the existing employees. In *C.M.E., Inc.*, 225 NLRB 514 (1976), the Board modified the finding of the administrative law judge who found that the successor's obligation to bargain attached when the union requested recognition. The Board, citing

[2] Although received as CP Exh. 1, the 4 pages of the Union's constitution and by-laws are not included as an exhibit because they were not submitted to the reporter.

Burns, held that the "obligation to bargain, including the setting or altering of initial terms of employment" commences on the date that the successor "made it 'perfectly clear' that it planned to retain all or substantially all of the employees." This principle has been applied in multiple cases including *Helnick Corp.*, 301 NLRB 128 fn. 1 (1991), in which the Board affirmed the administrative law judge's finding that the bargaining obligation attached on April 1 when the successor "informed employees that they could expect to be retained," and *New Breed Leasing Corp.*, 317 NLRB 1011 (1995), where the new employer failed to hire current employees in order to avoid a bargaining obligation and, but for that action, the respondent "would have hired" the predecessor's work force and it was, therefore "obligated . . . before it hired . . . to recognize and bargain with the Unions representing the employees in the two bargaining units . . . ." Id. at 1025.

C.M.E., Inc., 225 NLRB 514 (1976), was decided after the Board's decision in *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. on other grounds 529 F.2d 518 (4th Cir. 1975). In *Spruce Up*, a divided Board, applying *Burns*, held that it was not "perfectly clear" that the work force would be retained when, on February 6, 1970, the new employer, although stating that "all the barbers who are working will work," contemporaneously refused to recognize the Union and "told the union representatives what he planned to pay the barbers," a lower commission rate than they were currently receiving. Ibid. Members Fanning and Penello, in separate minority opinions, found that "all the barbers . . . will work" meant exactly that and, having expressed the intent to hire all of the barbers on February 6, the bargaining obligation, consistent with *Burns*, began on February 6. Chairman Miller and Member Jenkins characterized the "all the barbers . . . will work" statement as expressing only "a general willingness to hire" that was not within the "perfectly clear" caveat in *Burns*, and that the statement of the new employer "did not operate to forfeit his right to set initial terms." Id. at 195. Member Kennedy, who concurred with Chairman Miller and Member Jenkins in this aspect of the decision but otherwise dissented and found no bargaining obligation, found that the statement of a general willingness to hire was not controlling because the new employer "made clear to the union representatives on February 6 and to the Spruce Up barbers . . . that he would continue with the old work force only if they accepted the new commission rates which he proposed to them." Id. at 203 and fn. 11. Member Penello commented that the disregard of the "all the barbers . . . will work" statement by the majority constituted "a strained legal psychoanalysis, [by which] they contend that, despite the plain meaning of his words, Fowler [the new employer] did not really intend to retain the barbers." Id. at 207. Chairman Miller and Member Jenkins found that the new employer had no bargaining obligation until the employees accepted the new terms and constituted a majority of the new employer's work force. The February 6 inception of the bargaining obligation found by Members Fanning and Penello was a continuing obligation. Therefore, a majority of four Board members concurred that the new employer was obligated to bargain, but the earliest date upon which they agreed the obligation attached was in April when employees of the former employer constituted a majority of the unit.

In this case the Respondent, with no equivocation, announced its intention to staff the three St. Louis locations with employees represented by the Union. On April 15, Vice President Armine stated to the Union that it was Road & Rail's "intention to staff . . . these three facilities . . . with the existing employees," and, in response to the Union's request, agreed to recognize the Union. The plan to operate with fewer employees has no effect upon the Respondent's bargaining obligation. Shortly after the *Burns* decision, the Board held that the "plans to retain all the employees in the unit" language in *Burns* would cover not only the situation where the successor's plan includes "every employee in the unit, but also situations where it includes a lesser number but still enough to make it evident that the union's majority status will continue." *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976), cert. denied 429 U.S. 1040 (1977). The Board reaffirmed the foregoing principle in *Galloway School Lines*, 321 NLRB 1422 (1996), in which it pointed out that the critical inquiry was whether "the union's majority status will continue." Although the new employer plans "to employ a smaller workforce," the employer is required to bargain when it is "apparent from the new employer's hiring plan that the union's majority status will continue." Id. at 1427. The Respondent's undisputed intention to staff the St. Louis facilities from the cadre of existing employees, albeit with a smaller number than had been employed by Caliber, established its obligation to bargain.

Unlike the situation in *Spruce Up*, Road & Rail expressed more than a general willingness to hire existing employees. Vice President Armine stated Road & Rail's "intention to staff . . . these three facilities . . . with the existing employees," and, consistent with *Burns, C.M.E., Inc*., and *Galloway School Lines*, consulted with the Union and negotiated the initial terms and conditions of employment of the employees. Pursuant to the foregoing precedent, the Respondent would have violated Section 8(a)(5) of the Act if it had not consulted with the employees' collective-bargaining representative regarding their terms and conditions of employment. Upon reaching agreement, the parties signed a contract reflecting the terms and conditions of employment, effective on the date that the Respondent was to begin operations.

The General Counsel and Charging Party argue that the obligation to bargain did not occur until the employees were actually hired, noting Road & Rail's required drug tests and motor vehicle record checks. They cite the testimony of Lawshe, who, upon cross-examination, agreed with the General Counsel that, as a matter of logic, until they were actually hired, it was not certain that former employees of Caliber would constitute a majority of Road & Rail's work force. As a matter of logic, it is not absolutely certain that any event, whether it be the sun rising tomorrow or airline flight 643 arriving safely at its destination, will occur until it has occurred. The requirement of precedent is that it be "perfectly clear" that the new employer intends to hire a majority of the former employer's work force. It was, as Lawshe testified, the Respondent's intention to hire its workforce, albeit a smaller work force than that of Caliber, from the "most qualified" employees of Caliber. The preemployment screening imposed no requirements that any Caliber

employee would not be expected to meet. Employee Morton confirmed that, as Caliber employees, "we had to be able to drive." Caliber employees were subject to preemployment drug testing pursuant to Section 24.2 of the contract between Caliber and the Union. Vice President Armine was familiar with Caliber's employment practices and "had a high degree of confidence" that the Caliber employees would be qualified. His confidence was confirmed by the Respondent's hire of two Caliber employees as supervisors and the hire of 20 Caliber employees, more than 90 percent of its work force of 23.

Under the theory of the General Counsel and the Charging Party, the Respondent should have refused to bargain and assumed that the Region would dismiss any 8(a)(5) charge filed by Shopmen's Local 518 because the Respondent was screening employees with regard to its minimal job-related preconditions to employment, i.e., senses and reflexes undisturbed by the ingestion of drugs and truthful reports of traffic violations. I find that the foregoing is an assumption that the Respondent was not required to make. Under the General Counsel's theory, the Respondent should have trusted that the Region would credit a claim by the Respondent that it could not be certain that its stated intention to hire from the current work force would be realized because an insufficient number of Caliber employees, all of whom were required to have a valid drivers license and were subject to section 24.2 of their Union's contract with Caliber adopting the Drug Free Workplace Act, might not meet those requirements so as to constitute a majority of the Respondent's work force. I reject that theory. I find that the Respondent had no reason to suspect or believe that an insufficient number of Caliber employees would qualify for employment so as to constitute a majority of its work force.

The Charging Party, citing multiple cases, argues that the Respondent had no obligation to bargain until it actually hired a majority of the predecessor's employees. I disagree. The cases cited, including *A to Z Maintenance Corp.*, 309 NLRB 672 (1992), which the Charging Party discusses, are all factually distinguishable. In *A to Z Maintenance*, the new employer was "to hire not only from those prospects suggested by [the union] . . . but from other sources." Id at 673. The prematurely recognized union did not represent a majority of the unit employees and there was a "significant difference" between the former unit and the unit to which the employer granted premature recognition. Id at 674. There was "no successorship bargaining obligation under *Burns*." Id at 675. The Charging Party does not cite or address Board precedent as stated in *C.M.E., Inc*., supra, and *Galloway School Lines*, supra.

The General Counsel, citing *Marriott Management Services*, 318 NLRB 144 (1995), argues that Road & Rail is precluded from being a "perfectly clear" successor because it "announced to Shopmen's [Local 518] and therefore to employees, its intent to establish a new set of conditions of employment before offering a single employee a job." In *Marriott Management*, the Board acknowledged that communications with an incumbent union are "regarded . . . as communications with the employees through their representative.'" Id. at fn. 1. See also *Elf Atochem North America, Inc.*, 339 NLRB 796 fn. 3 (2003). In *Marriott*, the new employer announced that the health and welfare and pension plan in the incumbent union's contract were unacceptable, thus effectively stating its intention to establish its own terms and conditions of employment. Id. at 144, 148. In the instant case, the parties stipulated that, on April 15, the Respondent "notified Shopmen's Local 518 that it would hire a majority of Caliber . . . employees, that it would recognize Shopmen's Local 518, and that it *desired to negotiate* changed terms and conditions of employment. . . ." (Emphasis added.) Significantly, the Respondent did not announce that it was going to unilaterally establish any term or condition of employment or state that any specific provision of the current contract was unacceptable. It stated that it "desired to negotiate." It did so. In doing so, the Respondent abided by existing precedent that makes it imperative that the Respondent bargain with the incumbent collective-bargaining representative "prior to the new employer's extension of formal offers of employment to the predecessor's employees." *Canteen Co.*, 317 NLRB 1052, 1053 (1995).

The General Counsel, cites *MV Transportation*, 337 NLRB 770 (2002), in which the Board overruled its decision in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), which provided for an insulated period following successorship, and returned to the "doctrine that an incumbent union in a successorship situation is entitled only to . . . a rebuttable presumption of continuing majority status." The Board, *St. Elizabeth Manor,* specifically noted that its discussion related to situations involving "an ordinary successor—i.e., one that does not make it 'perfectly clear' that it intends to retain its predecessor's employee. . . ." Id. at 343 fn. 6. *MV Transportation* does not mention the *Burns* "perfectly clear" exception. The General Counsel, although implicitly acknowledging that there is no probative evidence of significant disaffection among the unit employees, refers to "seeds of discontent" that "may have matured." There is no objective evidence rebutting the Union's majority status. There is no evidence that the Respondent was aware that any more than the six employees on second shift at Hazelwood did not desire to be represented by the Union at any time prior to August 2 when the first authorization card for Teamsters Local 604 was signed. The filing of the representation petitions by Teamsters Local 604 in August did not rebut the Union's majority status. *Marion Memorial Hospital*, 335 NLRB 1016, 1018 (2001). *MV Transportation* is inapplicable in this "perfectly clear" successor case.

No party has cited, nor have I found, any case in which an 8(a)(2) violation has been litigated where the Respondent announced its plan to staff its work force with current employees, did not announce that it was setting initial terms and conditions of employment, and consulted with the employees' collective-bargaining representative and negotiated regarding the changes it sought to institute that differed from the current contract. Board precedent establishes that the Respondent would, in these circumstances, have violated Section 8(a)(5) of the Act if it had not consulted with the employees' collective-bargaining representative. The Respondent, having announced its hiring plan, bargained with the employees' collective-bargaining representative and the parties agreed to certain changed conditions of employment, including a reduced number of paid days off and, presumably although not specifically stated, a change in the identity of the insurance carrier, as well as various changes

of wording in the contract. They memorialized their agreement in a collective-bargaining agreement to be effective upon the date that the Respondent assumed operations. There was no unlawful premature recognition. The memorialization of the changed terms of employment, together with multiple unchanged terms, is consistent with Section 8(d) of the Act, which provides for the "execution of a written contract incorporating any agreement reached if requested by either party." I shall recommend that the 8(a)(2) and (3) allegations relating to the Respondent's recognition of Shopmen's Local 518 be dismissed.

B. The Allegations Relating to Union Security

The contract between the Respondent and the Union contains a valid union-security provision. I have found that the Respondent's recognition of the Union and execution of a contract was proper, I shall recommend that the 8(a)(3) allegations relating to enforcement of the valid union-security provision be dismissed.

The complaint currently alleges five instances of 8(a)(1) conduct relating to communications concerning the employees' obligations under the union-security provision. Counsel for the General Counsel's brief withdraws subparagraph 5(A)(i). Subparagraph 5(C) was withdrawn at the hearing. No evidence was adduced with regard to either allegation.

Subparagraph 5(A)(ii) alleges a threat by Supervisor Murphy, who oversaw Hazelwood and Venice, on September 20 after the Road & Rail corporate office forwarded to him dues check-off authorization cards for Shopmen's Local 518 with the following explanation:

> Enclosed please find authorizations for check-off dues which can be distributed to the employees [on a voluntary basis only] at the three locations covered by Local 518's Agreement. Employees should be told at some time, that they have the right to decline to pay union dues, however, we are a shop which is subject to a union dues requirement and that failure to tender dues may result in the union's request for their termination.

Murphy distributed the dues authorization cards. Employee Darrell Essex testified that he informed Murphy that he would not sign the card and that Murphy initially responded that he would have to let him go. Shortly thereafter, Murphy made a telephone call and then amended his response to Essex, stating that he needed to report to the Union "anyone who won't sign." Murphy testified that he simply read the document he was sent from corporate headquarters.

Essex did not sign the card after the "let him go" statement. He admits that Murphy amended his response after making a telephone call, stating that he only needed to report to the Union those who had not signed. The threat of termination was "effectively cured by [its] . . . prompt rescission." *Atlantic Forest Products*, 282 NLRB 855 (1987). The Union was entitled to know which employees would be tendering their dues rather than having them deducted by the Respondent. I shall recommend that the foregoing subparagraph be dismissed.

Subparagraph 5(B) alleges that Area Manager Lawshe, on September 28, threatened to discharge employees who did not sign dues-check-off authorizations and told employees that any employees who replaced them would be required to join the Union before they were hired. Lawshe testified that he spoke with the employees, referred to his prior union membership, and stated that he "would think [that signing the check-off authorization] . . . is something that they should do." Employee Larry Vincent, who went to the restroom in the course of Lawshe's remarks, testified that he heard him mention "terminating employees" starting at the bottom of some undefined list "if we didn't sign with 518" and that, for everyone terminated, "he would have somebody in the office who will sign with 518." Vincent recalled that Lawshe mentioned getting "sound advice from a lawyer." Lawshe denied threatening termination for failure to execute a dues-deduction card. He was aware of the contractual obligation that employees tender dues to Shopmen's Local 518 and admits telling the employees that, if someone was giving them advice, he hoped "that person does know what they're talking about." I credit Lawshe. There is no probative evidence of a threat to terminate for failure to sign a dues-check-off authorization as opposed to failure to tender dues. There is no evidence that any statement was made relating to replacement employees being required to join the Union before being hired. I shall recommend that subparagraph 5(B) be dismissed.

Subparagraph 5(D), amended into the complaint at the hearing, alleges that, on August 3, Supervisor Ken Tourville threatened to discharge employees if they did not sign dues check-off authorizations. On August 3, employee Essex solicited cards for Teamsters Local 604 at Hazelwood. Employee Edward Morton testified that Supervisor Ken Tourville stated that Essex was going to "get us fired" and if "you don't sign the 518 [dues deduction] card you'll get terminated." Tourville denies the foregoing statement. There is no evidence of any solicitation relating to dues-check-off authorizations for Shopmen's Local 518 prior to September. I credit Tourville's denial. I shall recommend that this allegation be dismissed.

Subparagraph 5(E), amended into the complaint at the hearing, alleges that Supervisor Bob Murphy, on December 7, threatened to discharge employees if they did not sign dues-check-off authorizations. In December, President Mark McGilvray left dues-deduction authorization cards with Murphy at Hazelwood and requested that Murphy post a letter in the office. McGilvray stated that he would return the following Friday to pick up the authorization cards. The posted letter cites the provision of the collective-bargaining agreement that requires membership in the Union and states that "[s]ince the Company does withhold the initiation fee and monthly dues, it is your responsibility to sign the application, dues authorization and initiation authorization card so that the monthly dues . . . [are] paid in to the office at the address listed above." Thereafter, Murphy acknowledges having a conversation with employee Edward Morton. Morton testified that, in the presence of Supervisor Tourville, Murphy told him that "corporate's breathing down my neck. I don't want to fire everybody, but if everybody doesn't sign the union card, everybody will be terminated." Although Tourville did not recall being present when Murphy "talked to employees about dues or dues authorization cards," he was not specifically asked and did not deny

being present at a conversation between Morton and Murphy. Although Murphy denied that he spoke of termination, he admitted asking Morton if he had thought about signing the dues-deduction authorization and telling him that "he was a good employee, I didn't want to lose him." The foregoing admission implies such a threat. Murphy had posted the letter stating that it was the "responsibility [of each employee] to sign the . . . dues authorization." The letter does not acknowledge the right of employees to tender dues without agreeing to the check-off of dues. McGilvray was returning on Friday to pick up the documents. I credit Morton and find that the Respondent threatened termination if the employees did not sign dues-check-off authorizations in violation of Section 8(a)(1) of the Act. *Rochester Mfg. Co.*, 323 NLRB 260, 262 (1997).

Subparagraph 5(F), amended into the complaint at the hearing, alleges a threat to terminate employees who did not sign check-off authorizations to Area Manager Lawshe on December 9. Essex testified that Manager Lawshe asked him whether Hazelwood employees were signing the "union dues cards." Essex testified that Lawshe said that the "problem" was with Local 518, that if the Union wanted employees who did not sign cards to be terminated Road & Rail would have "no choice . . . if the Union proposed that." Lawshe denied threatening any employee, including Essex, with termination for failing to sign a check-off authorization. Essex acknowledged that he was unaware that he could meet his dues obligation by paying the dues without authorizing the deduction from his pay. Any comments made by Lawshe relating to termination for failure to tender dues pursuant to the valid union security provision in the contract would, therefore, have been understood by Essex to have related to the failure to sign a check-off authorization. I credit Lawshe's credible denial that he threatened termination for failure to sign a check-off authorization. I shall recommend that this allegation be dismissed.

CONCLUSION OF LAW

By threatening employees with termination if they did not fulfill their obligation to tender dues to the Union by executing dues check-off authorizations, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Road & Rail Services, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that they will be terminated if they do not fulfill their obligation to tender dues to Shopmen's Local 518 by executing dues check-off authorizations.

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

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

(a) Within 14 days after service by the Region, post at its facilities in Wentzville and Hazelwood, Missouri, and Venice, Illinois, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 14, 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 the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 7, 2004.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[3] 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.

[4] If 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."