

**Aircraft Magnesium, a Division of Grico Corporation
and International Molders & Allied Workers
Union Local No. 374, AFL-CIO-CLC. Case
31-CA-11277**

December 16, 1982

DECISION AND ORDER

**BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN**

On August 6, 1982, Administrative Law Judge Gerald A. Wacknov issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The General Counsel has filed exceptions to the Administrative Law Judge's failure to find that Respondent is a successor to its predecessor and, therefore, obligated to bargain with the Union as the exclusive representative of a unit of its production and maintenance employees.¹ We find merit in these exceptions.

The facts are basically undisputed. The Union has represented the above unit of the predecessor, Aircraft Magnesium Corporation, since 1964. During this time, the Union and the predecessor had a series of collective-bargaining agreements covering these employees, the most recent one effective from October 1, 1980, through September 20, 1982. In late May 1981,² shortly before filing a petition for bankruptcy, the predecessor closed. At that time, approximately 14 to 17 foundry production employees were laid off. On June 18, Respondent purchased from the predecessor's creditor the following:

. . . all of the personal property assets of Magnesium including, but not limited to inventory, machinery, equipment, fixtures, intangibles and copies of the books and records of Magnesium including customer lists, invoices and the original operating permits thereof if available.

¹ The unit consists of all coremakers, maintenance mechanics, molders, furnace men, shipping and receiving clerks, straighteners, inspectors, sawmen, toolers, grinders, sanders, sandblasters, general helpers, and apprentices, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

² All dates are in 1981.

The next day, Respondent's president, Ronald Phelps, contacted all of the predecessor's former employees and informed them that he was interested in hiring them for the resumed operations. At this time, Phelps also announced certain changes in the terms and conditions of employment and that the company would be nonunion. He explained that the employees would be given the option of union representation at a later date. Although Respondent initially hired three or four employees who had not been former employees of the predecessor, it proceeded to hire former employees of the predecessor before it resumed operations on June 22, approximately 3 to 4 weeks after the predecessor had closed. (Full operations were resumed by June 27.)

Thus, on June 19, it hired five of these former employees: three foundry production employees, one office worker, and one foundry foreman. By June 27, nine more foundry production employees from the predecessor were hired. As stipulated by the parties, 11 of Respondent's 17 foundry production employees on June 27 were former employees of the predecessor; by July 3, 12 of Respondent's 19 foundry employees shared this status. All the above former employees of the predecessor resumed their earlier functions as foundry production employee, office clerical, or foundry foreman, as the case may be. There is no evidence of the proportion of Respondent's work force after July 3 as to who had been employees of the predecessor.

As for the operations themselves, the parties stipulated that Respondent performed the same magnesium and aluminum and molding work, in the same buildings, and with the same equipment as had the predecessor. They further stipulated that a majority of the customers and suppliers remained after the purchase.

In the meantime, at sometime between June 17 and 20, Union Representative Floyd O'Nesky met with Phelps and discussed the contractual relationship between the parties. Phelps informed O'Nesky that Respondent had no contract with the Union and would not then negotiate a contract with the Union. Phelps also told O'Nesky that he would let the employees decide in 60 days if they were still interested in representation by the Union.³ On July

³ In its answer to the complaint, Respondent did not specifically deny the allegation that it had refused to bargain with the Union. Rather it responded that it was under no obligation to bargain with the Union and that on June 24, 1981, it informed a union representative that if at the end of 60 days the employees wanted to be represented by the Union it would at that time make arrangements to discuss or negotiate a collective-bargaining agreement. Because Respondent failed to specifically deny the allegation that it had refused to bargain, we find, in conformity with the Board's Rules and Regulations, that it has admitted this allegation. National Labor Relations Board Rules and Regulations, Series 8, as

Continued

16, O'Nesky sent a letter to Respondent confirming this conversation and requesting a meeting to negotiate a contract. No evidence was presented that Respondent ever replied to this request. Rather, at Phelps' request, James Mobley, a former union steward, conducted a ballot on August 4 on whether the employees wanted to be represented by the Union. Mobley then wrote a letter to Respondent stating that the election showed that the employees no longer desired union representation.

The Administrative Law Judge considered the above-described evidence and found it insufficient to determine whether Respondent met the traditional standard for successor status, i.e., a substantial continuity in the employing industry. In making this finding, the Administrative Law Judge particularly relied on the hiatus in operations. He also relied on Respondent's status as "part of a multi-plant integrated enterprise," that is engaged in the machining and fabrication, but not the manufacture, of aluminum castings and other materials. According to the Administrative Law Judge, this status would have an apparent effect on the customers with whom Respondent would be dealing.

Since a bargaining obligation arises only in the case of a successor, the Administrative Law Judge recommended that the complaint be dismissed in its entirety. The General Counsel, however, contends that the record substantiates those factors that the Board traditionally considers in determining whether there is a substantial continuity in the employing industry, and that Respondent, therefore, is a successor. We agree.⁴

In determining whether a purchaser is obligated to bargain with the exclusive representative of its predecessor's employees, the traditional test is whether there is substantial continuity in the employing enterprise.⁵ Where there is such a continuity, the presumption of majority status by the union under the predecessor, such as established by a collective-bargaining agreement as here, is not affect-

ed by a change in ownership.⁶ The traditional criteria for this test include whether there has been substantial continuity in the following: (1) business operations; (2) plant; (3) work force; (4) jobs and working conditions; (5) supervisors; (6) machinery, equipment, and methods of production; and (7) product or service.⁷ Applying these well-settled criteria to the totality of the circumstances here, we conclude that Respondent is a successor.

The parties stipulated that Respondent resumed the same magnesium and aluminum molding and casting work, at the same location, and with the same equipment, approximately 4 weeks after the successor ceased operations. It retained the overall job classifications (foundry production employee, office worker, and foundry foreman) and at least one of the supervisory personnel (foundry foreman). Also according to the stipulations, Respondent dealt with the majority of the same suppliers and customers as its predecessor. No evidence supports the Administrative Law Judge's reservations that Respondent's corporate status affected the customers of the operations relevant here.

Further, the record uncontrovertedly shows that the majority of Respondent's employees at the date it resumed operations and continuing at least through July 3 were former employees of the predecessor. It is well settled that the significant time frame for determining what percentage of a purchaser's employees were former employees of a predecessor is when a demand for bargaining has been made and a representative complement of an employer's work force is on the job.⁸ Here, the Union's demand for bargaining before June 22 occurred shortly before operations resumed at Respondent's facility. When Respondent resumed operations, a representative complement of its work force was present.⁹ In this regard, we note that there were between 14 and 17 employees in the bargaining unit at the time the predecessor ceased operations. The size of the bargaining unit remained substantially the same after Respondent resumed operations. On June 27, after Respondent had operated for 1 week, 11 of the 17 unit employees were former employees of the predecessor. By

amended, Sec. 102.20. See, e.g., *International Printing and Graphic Communications Union, Local 391 (Salem Gravure Division of World Color Press, Inc.)*, 259 NLRB 1182, 1183 (1982).

⁴ We also agree with the General Counsel that the facts here are substantially distinguishable from those in *Radiant Fashions, Inc.*, 202 NLRB 938 (1973), and *Gladding Corporation: Gladding Paris-Corporation*, 192 NLRB 200 (1971), on which the Administrative Law Judge relied to find no successorship. Thus, in *Radiant Fashions, Inc.*, *inter alia*, the purchaser bought the assets of only one segment of the predecessor, and, after a 2-1/2- to 3-month hiatus in operations, there was a significant change in customers, products, methods of production, and type of market. Similarly, in *Gladding Corporation*, after a hiatus of over 2 months, the predecessor's employees remained a minority, and the purchaser changed its main line of products, almost all of its suppliers, and all but one of its customers.

⁵ *Lincoln Private Police, Incorporated as Successor to Industrial Security Guards, Inc.*, 189 NLRB 717, 719 (1971). See also *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 279-281 (1972).

⁶ See *Merchants Home Delivery Service, Incorporated*, 230 NLRB 290, 295 (1977), enforcement denied on other grounds 580 F.2d 966 (9th Cir. 1978); *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962, 963 (1970), enforcement denied on other grounds *sub nom. N.L.R.B. v. Tragniew, Inc. and Consolidated Hotels of California*, 470 F.2d 669 (9th Cir. 1972).

⁷ E.g., *Premium Foods, Inc.*, 260 NLRB 708, 714 (1982). Continuity of customers has also been considered as a factor in determining continuity in the employing industry. See, e.g., *Stewart Chevrolet, Inc.*, 262 NLRB 362, 363 (1982).

⁸ E.g., *Hudson River Aggregates, Inc.*, 246 NLRB 192, fn. 3 (1979), *enfd.* 639 F.2d 865 (2d Cir. 1981).

⁹ It is axiomatic that a request for bargaining is continuous and need not be repeated. See, e.g., *Williams Energy Company*, 218 NLRB 1080, fn. 4 (1975).

the next payday, July 3, 12 of a total of 19 unit employees were formerly employed by the predecessor. It is, therefore, clear that the majority of Respondent's employees were former employees of the predecessor from the time Respondent began operations until at least July 3.

Contrary to the Administrative Law Judge, we do not find that these factors demonstrating substantial continuity of the employing industry are overcome by the 3- to 4-week break between the predecessor's closing and Respondent's start of operations. It is well settled that a hiatus is only material in determining successorship status where there have been other substantial changes in operations.¹⁰ Further, the significance of a hiatus to successorship status is its effect on the employees' expectations of rehire.¹¹ In view of these considerations, we find the 3- or 4-week hiatus not to be determinative.¹² We particularly note the speed with which Respondent expressed interest in rehiring all of the predecessor's employees the day after the purchase was completed and the subsequent expeditious hiring action carrying out this intention.

On the basis of this evidence, we conclude that Respondent is a successor to the predecessor with which the Union had a collective-bargaining agreement effective at the time of purchase.¹³ It, therefore, had an obligation to bargain with the Union on and since June 22, 1982.

Further, Respondent did not have the option of postponing this obligation to bargain for 60 days until it made its own determination of whether the Union still enjoyed majority status.¹⁴ A union is not required to substantiate anew its majority status when a successor assumes an employer's busi-

ness.¹⁵ Rather, a successor employer is obligated to bargain with the exclusive bargaining representative of the employees acquired from the predecessor unless it demonstrates either that the representative no longer enjoys majority support on the date of its refusal to bargain or that it has a good-faith doubt of the representative's continued majority support.¹⁶ Here, Respondent has demonstrated neither alternative. Instead, it encouraged and sanctioned an employee-conducted election to test the Union's support approximately 60 days after it assumed operations. This has no relevance to the status of union support on or about June 22, when operations resumed and after the Union made its initial demand for bargaining,¹⁷ and, also, relevance to Respondent's duty to bargain on and since that day.¹⁸

As Respondent has admitted its refusal to bargain with the Union, contesting only its obligation to do so, we conclude that it has violated Section 8(a)(5) and (1) of the Act by this refusal.

CONCLUSIONS OF LAW

1. Respondent, Aircraft Magnesium, A Division of Grico Corporation, is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Molders & Allied Workers Union Local No. 374, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All coremakers, maintenance mechanics, molders, furnace men, shipping and receiving clerks, straighteners, inspectors, sawmen, toolers, grinders, sanders, sandblasters, general helpers, and apprentices, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. International Molders & Allied Workers Union Local No. 374, AFL-CIO-CLC, has been and is the exclusive representative of all the employees in the aforesaid appropriate unit for the

¹⁰ *United Maintenance & Manufacturing Co., Inc.*, 214 NLRB 529, 532 (1974).

¹¹ *Mondovi Foods Corporation*, 235 NLRB 1080, 1082 (1978).

¹² See, e.g., *The Daneker Clock Company, Inc.*, 211 NLRB 719, 721 (1974), *enfd.* 516 F.2d 315 (4th Cir. 1975); *C. G. Conn Ltd., a wholly owned subsidiary of Crowell Collier and MacMillan, Inc.*, 197 NLRB 442, 446-447 (1972), *enfd.* 82 LRRM 3092 (5th Cir. 1973), in which substantial continuity supported findings of successorship status despite a 7- and 4-1/2-month hiatus, respectively.

¹³ Neither do we find any merit to Respondent's contentions that the following factors defeat successorship status: (1) it purchased the business from the predecessor's creditor in bankruptcy, not directly from the predecessor; and (2) it informed the employees when they were hired that it would be nonunion and that the employees would be permitted the option of union representation at a later date. Direct purchase from a predecessor is not a prerequisite to successorship. Cf. *Makaha Valley, Inc.*, 241 NLRB 300, 303 (1979) (intervening trusteeship did not defeat successorship status). Further, successorship status, with its attendant duty to bargain, is not elective with an employer. Rather, it is a legal determination based upon well-settled criteria designed to protect the employees' continued right to representation. Cf. *Hudson River Aggregates, Inc.*, *supra* at 197; *Maintenance, Incorporated*, 148 NLRB 1229, 1301 (1964), which hold that successorship arises from public obligation not private contract.

¹⁴ *Half-Century, Inc., d/b/a Holiday Inn of Niles Michigan*, 241 NLRB 555, 559-560 (1979), enforcement denied on other grounds 652 F.2d 612 (6th Cir. 1980).

¹⁵ *Pre-Engineered Building Products, Inc.*, 228 NLRB 841, 844 (1977), enforcement denied on other grounds 603 F.2d 134 (10th Cir. 1979).

¹⁶ *Westwood Import Company, Inc.*, 251 NLRB 1213, 1225, *fn.* 21 (1980).

¹⁷ See *Houston Distribution Services, Inc.*, 227 NLRB 960, 968, *fn.* 20 (1977), *enfd.* 573 260 (5th Cir. 1978).

¹⁸ See *C. G. Conn Ltd., a wholly owned subsidiary of Crowell Collier and MacMillan, Inc.*, *supra*, in which a loss of majority support by a bargaining representative subsequent to an initial request for bargaining was found immaterial where an employer had continually unlawfully refused to bargain. See also *Half-Century, Inc., d/b/a Holiday Inn of Niles Michigan, supra* at 559-560.

purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing, on or about June 22, 1981, and at all times thereafter, to recognize and bargain collectively with the above-named labor organization as the exclusive representative of all its employees in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Aircraft Magnesium, A Division of Grico Corporation, Gardena, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Molders & Allied Workers Union Local No. 374, AFL-CIO-CLC, as exclusive representative of the following unit:

All coremakers, maintenance mechanics, molders, furnace men, shipping and receiving clerks, straighteners, inspectors, sawmen, toolers, grinders, sanders, sandblasters, general helpers, and apprentices, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

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

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

(a) Upon request, bargain with the above-named Union as exclusive representative of employees in the above-described unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

(b) Post at its Gardena, California, plant copies of the attached notice marked "Appendix."¹⁹ Copies of said notice, on forms provided by the

Regional Director for Region 31, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

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

¹⁹ In the event that 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."

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain collectively with International Molders & Allied Workers Union Local No. 374, AFL-CIO-CLC, as exclusive representative of the following unit:

All coremakers, maintenance mechanics, molders, furnace men, shipping and receiving clerks, straighteners, inspectors, sawmen, toolers, grinders, sanders, sandblasters, general helpers, and apprentices, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL, upon request, bargain collectively with the aforesaid Union as the exclusive representative of all employees in the appropriate unit described above with respect to rates of pay, hours of employment and other terms and conditions of employment and, if an under-

standing is reached, embody such understanding in a signed agreement.

**AIRCRAFT MAGNESIUM, A DIVISION
OF GRICO CORPORATION**

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice, a hearing with respect to this matter was held before me in Los Angeles, California, on June 22, 1982. The charge was filed on June 30, 1981, by International Molders & Allied Workers Union Local No. 374, AFL-CIO-CLC (herein called the Union).

Thereafter, on August 14, 1981, the Acting Regional Director for Region 31 of the National Labor Relations Board (herein called the Board) issued a complaint and notice of hearing alleging a violation by Aircraft Magnesium, A Division of Grico Corporation (herein called Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (herein called the Act).

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. At the close of the hearing, the parties argued the matter orally and specifically waived their right to file post-hearing briefs.

Upon the entire record, and based upon my observation of the witnesses and consideration of the arguments presented, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is now, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of California, with an office and principal place of business located in Gardena, California, where it is engaged in the manufacture of aircraft and commercial parts. In the course and conduct of its business operations, Respondent annually sells goods or services valued in excess of \$50,000 to customers or business enterprises within the State of California, which customers or business enterprises themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standard. Further, Respondent, in the course and conduct of its business operations, annually derives gross revenues in excess of \$500,000.

It is admitted, and I find, that Respondent is now, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issue raised by the pleadings is whether Respondent is a successor employer and has violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Union as the collective-bargaining representative of Respondent's employees.

B. The Facts

The following facts are not in material dispute, and have largely been stipulated to by the parties.

The Union has represented the production and maintenance employees of Aircraft Magnesium Corporation (herein called the predecessor),¹ since 1964.

In late May 1981, the predecessor ceased its production operations and shortly thereafter, on June 5, 1981, filed a petition for bankruptcy.

On or about June 18, 1981, Respondent, without having any direct dealings with the predecessor, purchased from the bank, the predecessor's creditor, all of the predecessor's tangible assets, including the facilities, equipment, supplies and materials, customer lists, and certain books and records, but excluding accounts receivable and related documents. Since June 22, 1981, Respondent has been performing substantially the same aluminum molding and casting work, at the same location, using the same equipment, and has sold its products to customers, the majority of which had been customers of the predecessor.

The first three or four employees hired by Respondent herein were not former employees of the predecessor, but rather were apparently former employees of Grico Corporation. Upon interviewing the latter group of employees, Ronald E. Phelps, president of Grico Corporation, made it clear, pursuant to their questions, that the company was nonunion. However, he added that the employees could select the Union as their representative at some time after business operations became established, if they choose to do so. He told the employees that they would be working for Grico Corporation, and that they would receive the health insurance, paid vacations, holidays, and wages that Grico Corporation employees received. He further told the employees that they would receive 15 cents per hour above what they had made working for the predecessor, and that the wage situation would be reviewed after 60 days to see whether further raises were feasible.

On June 19, 1981, Respondent hired five people who had as of May 1981 been employed by the predecessor; three of these had been and continued to be foundry production employees, one had been and continued to be an office worker, and one had been and continued to be the

¹ The unit description as contained in the complaint and as found to be appropriate herein, is as follows:

Included: All coremakers, maintenance mechanics, molders, furnace men, shipping and receiving clerks, straighteners, inspectors, sawmen, toolers, grinders, sanders, sandblasters, general helpers, and apprentices; Excluded: All office clerical employees, professional employees, guards and supervisors as defined in the Act.

foundry foreman. Thereafter, during the week and payroll period ending June 27, 1981, Respondent hired an additional nine people who had as of May 1981 worked for the predecessor; all of these had been and continued to be foundry production employees.

As of the end of the payroll period ending June 27, 1981, Respondent issued paychecks to a total of 17 foundry production employees, 1 office worker, and 1 foundry foreman. Of the 17 foundry employees receiving paychecks, 11 had been as of May 1981 foundry production employees of the predecessor. As of the end of the payroll period ending July 3, 1981, Respondent employed a total of 19 foundry employees, 1 office worker, and 1 foundry foreman. Of the 19 foundry employees, 12 had been as of May 1981 foundry employees of the predecessor.

According to Respondent's answer to the complaint, 41 percent of its then current complement of employees as of about August 27, 1981 (the date of its answer), had been former employees of the predecessor.

On June 19, 1981, Respondent sent the following letter to the predecessor's former customers:

We are pleased to announce that on 6/18/81 Grico Corporation purchased certain operating assets of the Aircraft Magnesium Corporation, which as you may know is in bankruptcy. Effective this date the business will now be owned by Mr. R. E. Phelps and will be operated as Aircraft Magnesium/Division of Grico Corporation. With Mr. Phelps' wide span of knowledge within the casting industry, we at Aircraft Magnesium have a new and definite direction in which to go. We know that this will enable our new team to serve you, our customer, more efficiently and effectively.

We plan to be in full production by 6/22/81. We ask your patience and understanding in the matter of delivery schedules. Under the previous management, production was halted in the early part of May, thus we are currently looking at a seven week delay on numerous orders. We are currently reviewing all orders in house and will be advising all customers as soon as possible as to the updated delivery schedules. Our chief goal of course, is to bring all orders to a current status as soon as possible.

In addition to casting capabilities, Grico Corporation is a full line machining and manufacturing company for the aerospace industry. We are now able to offer fully machined parts and castings.

If we can assist you in any further manner or answer any questions that may arise, please do not hesitate to call us.

In about mid-June 1981, Union Representative Floyd O'Nesky went to see Mr. Phelps, and discussed with him the contract between the Union and the predecessor, which contained a union-security clause and extended from October 1, 1980, through September 30, 1982. O'Nesky took the position that Respondent should honor the contract. Phelps said, according to O'Nesky, that he had no contract with the Union, and that he could not

negotiate a contract at that time. Further, he asked for a 60-day grace period to see if he could get the business off the ground.

Phelps testified that he told O'Nesky that he was attempting to get the company in operation, and said he would not be interested in discussing a contract for at least 60 days, and that after that time if the employees wanted a contract he would be more than happy to sit down and discuss it.

On July 16, 1981, O'Nesky sent a letter to Respondent confirming their conversation in June, asking Phelps to reconsider his position, and requesting a meeting to negotiate a contract.

On about August 4, 1981, at the behest of Phelps, the employees conducted a secret-ballot election to determine whether they wanted the Union. Phelps told the employees if they wanted the Union he would go for it. James Mobley, a former union steward who had worked for the predecessor, organized and conducted the ballot, and submitted the following letter to Phelps:

To: Aircraft Magnesium/Div. of Grico Corporation

I, James Mobley, having been elected spokesman by my fellow employees, have conducted a vote by secret ballot. The purpose of this vote was to determine whether or not we wanted to have the union as a bargaining representative.

The result of this vote is that we, the employees, do not wish to be represented by the union.

/s/ James Mobley

JAMES MOBLEY

Spokesman for the Employees

C. Analysis and Conclusions

Respondent takes the position that it did not purchase an operating business from the predecessor corporation, but rather purchased a defunct business operation from its creditor in bankruptcy, hired employees who acknowledge at the outset that they understood they would not be working under a union contract or union representation unless they selected the Union at a later date, and that at such a later date, namely about August 4, 1981, the employees chose not to be so represented. For the foregoing reasons, Respondent maintains that it is not a successor employer, and is thereby not obligated to bargain with the Union, arguing further that it neither purchased nor assumed any obligations of the predecessor, and therefore should not be required to succeed to the predecessor's bargaining obligation.

The assets of the predecessor herein were purchased not by Respondent, but by Grico Corporation, from the predecessor's creditor in bankruptcy. At the time of the purchase, Grico Corporation was then and has continued to be a business enterprise engaged in the machining and fabrication, but not the manufacture, of aluminum castings and other materials. As noted, the predecessor herein operated a foundry that manufactured rough castings of aluminum and magnesium. The record does not show whether, while the predecessor was an ongoing

business enterprise, its rough castings were machined or finished by Grico Corporation.

In *Johnny Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), the Supreme Court, in discussing the need for bargaining continuity under the successorship principle, stated:

Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship [*Id.* at 549]. [Emphasis supplied.]

In *Radiant Fashions, Inc.*, 202 NLRB 938 (1973), the Board found no successorship under facts analogous to those involved herein. The Board's analysis, although lengthy, is deserving of serious consideration. Thus, the Board stated (at 940-941):

At the outset, it should be noted that there are present in this record certain factors which we have relied on in the past in finding successorship. Thus, when Respondent commenced operations in September 1971, it was engaged in a business related to that of Charmfit although on a reduced scale. Moreover, its business was run at the same location, utilizing much of the same basic equipment, and employing a reduced work force consisting mainly of employees of the predecessor company under substantially the same supervisory authority.

We have long recognized, however, that the crucial inquiry in determining whether a purchaser is a successor for purposes of Section 8(a)(5) is the continuity of the employing industry, *Galis Equipment Company, Inc.*, 194 NLRB 799, and that in making this inquiry the totality of the circumstances surrounding the transfer must be considered. *Lincoln Private Police, Inc.*, 189 NLRB 717. Accordingly, in cases similar to the instant case, in which all or most of the above-described factors were present, we nevertheless refused to find successorship when persuaded that countervailing elements existed which destroyed the continuity of the employing industry. E.G., *Norton Precision, Inc.*, 199 NLRB 1003. We are so persuaded by the record in this case.

First, when Charmfit ceased production and terminated the employees in June, there were at that time no plans to sell the Los Angeles facility to Froehlich. The possibility of such a sale was raised for the first time the following month in conjunction with discussions for a settlement of Froehlich's employment contract. It was not until August 25 that the sale was consummated and 1 month passed

thereafter before operations actually commenced. Consequently, there was a hiatus of between 2-1/2 and 3 months between the time that Charmfit shut down completely and Respondent began production.

While it is true that all of the employees hired by Respondent within the first 3 months of operation were former Charmfit employees, it cannot be said that a sudden change in the employees' employment relationship was brought about by the sale of the plant and equipment to Respondent. At the time of their termination by, and receipt of severance pay from, Charmfit there was absolutely no basis whatsoever for any expectation on the part of the employees that their employment would ever be resumed at the Los Angeles plant; much less by a corporation which was then nonexistent and whose formation had not as yet been contemplated by anyone. Although not in itself controlling, the lengthy hiatus in resumption of production at the plant, and in the employment of those employees eventually hired by Respondent, is a significant factor in determining whether there exists a continuity in the employing industry. *Norton Precision, Inc.*, *supra*; *Gladding Corporation*, 192 NLRB 200; *Ellary Lace Corp.*, 178 NLRB 73.

Second, the record adequately demonstrates that rather than purchasing an ongoing business enterprise from Charmfit, Respondent only purchased the assets of one segment of such an enterprise

* * * * *

On balance, we find that the lengthy hiatus in operations, the evidence pointing towards a purchase of assets rather than the purchase of an ongoing business, the absence of any significant carryover in customers, and the differences in the markets supplied by Charmfit and Respondent all indicate an extinguishment of the continuity of Charmfit's business enterprise. Accordingly, we find that Respondent is not a successor to Charmfit for purposes of applying the obligations of Section 8(a)(5) of the Act and shall therefore dismiss the complaint in its entirety.

The Board, in *Radiant Fashions*, also considered it to be important to analyze the differences between the markets of the two enterprises. In the instant case, the only evidence on this point is the stipulation by the parties that a "majority" of Respondent's customers are former customers of the predecessor. Significantly, the record does not show the extent of this "majority" nor does it show whether included within this group are customers with which Grico Corporation had done business prior to commencing the manufacturing operations herein. Moreover, Grico Corporation's capacity to now perform the manufacture of rough castings as well as the machining and fabrication of castings, by its very nature, would seem to appeal to a considerably broader market than that of the predecessor which merely manufactured and

sold rough castings, and the record contains no evidence regarding the obviously integrated operations of Respondent and Grico Corporation.

Also highly instructive is the Board's rationale in *Gladding Corporation; Gladding-Paris Corporation*, 192 NLRB 200 (1971), wherein the Board states, at footnote 2:

In adopting the Trial Examiner's conclusion that Respondents are not successor-employers of the employees of Paris Manufacturing Company, hereinafter Paris, we rely solely on the following factors: (a) on January 7, 1970, and before Gladding Corporation appeared on the scene, Paris, a concern that had been failing financially for a number of years, was forced to initiate bankruptcy proceedings and effectively lost control over its own existence; (b) between January 22, 1970, and February 27, 1970, control over the day-to-day operations of Paris was granted by the bankruptcy court to the Small Business Administration, a government agency; (c) after February 27, 1970, Paris ceased to exist as a going concern inasmuch as it ceased all manufacturing operations, shut down its machinery, laid off its employees, closed its doors, and surrendered the premises to its landlord; (d) in negotiating for a leasehold interested in the machinery and plant, Gladding Corporation dealt with the creditors and landlord of Paris, and not with Paris itself, because, by a series of financial transactions over a period of years, Paris had lost all title to the machinery and plant; (e) although between February 27, 1970, when Paris closed its doors, and May 6, 1970, when Gladding-Paris Corporation commenced operations—a hiatus of over 2 months—seven former employees of Paris remained on the premises, they were engaged only in caretaking duties and were paid by and were employees of the landlord, not Paris, for this period; and (f) Gladding-Paris, unlike Paris, is part of a multiplant, integrated enterprise. In the circumstances present herein, we believe the conclusion is warranted that the nature and character of the employing industry at the South Paris, Maine, facility has been sufficiently altered so that we cannot find, under applicable Board precepts, that Respondents are successor-employers to Paris. Cf. *Southland Manufacturing Corp.*, 186 NLRB 792. Moreover, we note that Gladding-Paris Corporation has only one customer in common with Paris and has obtained other customers from unrelated sources. While we do not believe this factor to be controlling, we regard it as a significant part of the total elements to be considered. Cf. *Lincoln Private Police, Inc.*, 189 NLRB 717.

It is interesting to note that the Board in both *Radiant Fashions* and *Gladding Corporation* deems a hiatus period of "between 2-1/2 and 3 months" and "over 2 months," to be highly significant. In the instant case

there was a hiatus² of from 4 to 7 weeks, as the record shows that the predecessor's operations were totally dormant for about a month and, according to the letter which Respondent sent to the predecessor's customers, "Under the previous management, production was halted in the early part of May, thus we are currently looking at a seven week delay on numerous orders."

In summary, the hiatus between the operations of Respondent and the predecessor herein is highly significant to the resolution of the successorship issue. Further, a careful analysis of all available information permitting a comparison of the two business enterprises appears essential, particularly as Respondent, unlike the predecessor, appears to be "part of a multi-plant, integrated enterprise." (See *Gladding Corporation, supra.*) On the basis of the foregoing, I conclude that the record is insufficient to permit the requisite analysis to ascertain whether, under all the facts and circumstances, the employing industry has remained essentially the same. See also *Blazer Industries, Inc. a/k/a Blazer Corporation and Tru-Air Corporation*, 236 NLRB 103 (1978); *Norton Precision, Inc., A Subsidiary of Norton Foundries Company*, 199 NLRB 1003 (1972); *Ellary Lace Corp.*, 178 NLRB 73 (1969); *Gladding Corporation; Gladding-Paris Corporation*, 192 NLRB 200 (1971); *Southland Manufacturing Corp.*, 186 NLRB 792 (1970). Compare, *The Daneker Clock Co., Inc.*, 211 NLRB 719, enfd. 516 F.2d 315 (4th Cir. 1975); *Mondovi Foods Corporation*, 235 NLRB 1080 (1978).

Therefore, on the basis of the foregoing, I do not believe that the finding of a violation is warranted herein. In this regard, it should be noted that the cases cited by the General Counsel in her closing argument³ have been carefully considered, and are deemed to state general propositions of successorship law which do not specifically address the issues presented herein.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
 3. Respondent has not violated the Act as alleged.
- [Recommended Order for dismissal omitted from publication.]

² See *Makaha Valley, Inc.*, 241 NLRB 300 at fn. 1 (1979), for the Board's definition of hiatus, as follows:

[W]e find that when the Board speaks of a "hiatus," . . . it refers to a period of time when the employing enterprise ceases to exist as it had prior to the insolvency proceeding and is either (1) totally dormant; (2) engaged in activities associated with the termination of its operation; or (3) engaged in activity totally dissimilar to that of the bankrupt.

³ *Wackenhut Corporation v. International Union, United Plant Guard Workers of America*, 332 F.2d 954 (9th Cir. 1964); *Pre-Engineered Building Products, Inc.*, 228 NLRB 841, remanded 603 F.2d 134 (10th Cir. 1979); *Stewart Granite Enterprises*, 255 NLRB 569 (1982); and *Bellingham Frozen Foods, Inc.*, 237 NLRB 1450, enfd. 626 F.2d 674 (9th Cir. 1980).