Level, a Division of Worcester Manufacturing, Inc. *and* Local 154–136 BFW, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO. Case 1–CA–27007

January 29, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On May 9, 1991, Administrative Law Judge Lowell M. Goerlich issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in response.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as explained below, and to adopt the recommended Order as modified and set out in full below.[2]

The judge found that the Respondent, as a *Burns*[3] successor, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and by making certain unilateral changes in its employees' rates of pay and benefits. The judge additionally found that the Respondent violated Section 8(a)(1) of the Act by telling employees that it expected to operate nonunion and, further, that this conduct tainted the Respondent's asserted good-faith doubt of the Union's majority status.

We agree with the judge's findings and with his recommended make-whole remedy but only for the reasons set forth below.

Background

On Friday, December 1, 1989, Mason & Parker Mfg. Co., Inc., then a party to a collective-bargaining agreement with the Union covering a unit of production and maintenance employees, concluded an assets sale to the Respondent, ceased operations, and laid off its three unit employees. Sometime earlier that week, Charles Flanagan, the Respondent's president, had met with the Mason & Parker unit employees to discuss the pending sale.

Flanagan testified that at that meeting he informed the employees that he would extend offers of employment to ''some experienced people,'' that the Respondent was nonunion in Worcester and that ''I would expect that we would be able to operate in a nonunion environment'' in the Mason & Parker facility. James Kublbeck, a unit employee, testified that Flanagan stated that unit employees ''were all going to be dismissed and all rehired'' by the Respondent and, additionally, that ''the pays [sic] and benefits would not change.''

On Monday, December 4, 1989, the Respondent resumed operation of the purchased business at the same location. That same day, two of the three Mason & Parker unit employees who had been laid off the previous Friday applied for employment with the Respondent and were immediately hired to perform the same work they had done for Mason & Parker. They received the wages and health insurance called for in the 1987–1990 collective-bargaining agreement. On December 8 and 11, the Respondent hired two additional former Mason & Parker employees. The size of the work force remained at four until March 1990 when the Respondent hired two more former unit employees. The four employees hired after December 4, 1989, had been on layoff status from Mason & Parker at the time of the assets sale.

The Union requested recognition and bargaining on December 8, 1989, and the Respondent refused to comply with that request on January 10, 1990. The Respondent, without having informed the employees of any changes in their terms and conditions of employment before hiring them, proceeded on and after December 4, 1989, to make certain changes from the terms and conditions originally established by the contract between the Union and Mason & Parker without offering at any time to bargain with the Union about them. The Respondent discontinued the pension and disability plans, eliminated vacation leave and then later reinstated it, eliminated the ''well day'' policy, and reduced funeral leave. The employees did not receive the contractual wage increase scheduled for January 1, 1990, although they did receive a unilaterally determined increase in mid-1990.

The Judge's Decision

The judge found, inter alia, that the Respondent's operations following the transfer of assets from Mason & Parker constituted a substantial continuity in the employing enterprise and concluded that the Respondent was a *Burns* successor with an obligation to recognize and bargain with the Union representing its predecessor's employees. The judge further found the bargaining obligation arose on the first day of operations, December 4, 1989, when the entire initial unit employee complement of two consisted of former employees of the predecessor.

[1] In sec. III, par. 3, of his decision, the judge inadvertently referred to certain events as having occurred in 1988. The correct year is 1989.

[2] The judge's recommended Order includes a visitatorial clause. We find no need for such a remedial provision here. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[3] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

In finding the alleged refusal-to-bargain violation, the judge rejected the Respondent's defense that antiunion statements by employees constituted an objective basis for a good-faith doubt of the Union's majority status. The judge found that Flanagan's statement to the Mason & Parker employees at a preemployment meeting in late November that he expected to operate in a ''nonunion environment'' violated Section 8(a)(1). The Respondent, the judge held, could not, in such circumstances, base a good-faith doubt on employee sentiment against union representation expressed after the takeover in light of that violation. The judge stressed the Supreme Court's observation that a predecessor's employees, during their initial period of employment with a successor, ''might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor.'' *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 40 (1987).

The judge also found that the Respondent further violated Section 8(a)(5) by unilaterally changing, on and after December 4, 1989, the wages, benefits, and other terms and conditions of employment of its employees hired from Mason & Parker. The judge noted that under the *Burns* rule a successor employer is ordinarily free to set the initial terms on which it will hire the employees of a predecessor. He found, however, that the ''perfectly clear'' exception to that rule applies here.[4] In particular, because the Respondent had stated its intention, in late November 1989, to offer employment to all unit employees, it was obligated to consult with the Union before departing from the existing wages and benefits. Here, those wages and benefits were established by the collective-bargaining agreement between Mason & Parker and the Union. The judge recommended a make-whole Order, relying on *State Distributing Co*., 282 NLRB 1048 (1987), and *U.S. Marine Corp*., 293 NLRB 669 (1989).

The Respondent's Exceptions

While now conceding that it is a *Burns* successor, the Respondent argues that its refusal to recognize the Union did not violate Section 8(a)(5) because at that time certain antiunion statements by its employees provided it with an objective basis for a good-faith doubt of the Union's majority status. Specifically, the Respondent excepts to the judge's finding that Flanagan's November 1989 statement that he ''would expect'' to operate nonunion violated Section 8(a)(1) and tainted the employees' repudiation of the Union.

The Respondent further excepts to the finding of an 8(a)(5) violation with respect to unilateral changes and to the corresponding remedy requiring it to reinstate those terms and conditions of employment that were not continued after it purchased its predecessor's assets. The Respondent argues that its due-process rights have been violated because the General Counsel did not seek to amend the complaint to allege unlawful unilateral changes. The Respondent contends that the General Counsel's request of the judge at the hearing for a status quo ante remedy, standing alone, provided insufficient notice that the General Counsel was challenging the Respondent's *Burns* right to set initial terms. Further, the Respondent contends that, in the absence of any 8(a)(3) discriminatory refusals to hire the predecessor's employees, the cases relied on by the General Counsel and the judge to support the latter's remedy are inapposite.

Analysis

1. We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by telling employees that it would expect to operate nonunion. As discussed more fully below, the Respondent's statements to employees during the last week of November were sufficient to establish a bargaining obligation under *Spruce Up Corp*., 209 NLRB 194 (1974). By saying that it would expect to operate nonunion, the Respondent was telling its employees that it would not honor its statutory obligation to bargain. Where, as here, an employer tells employees of facts which generate an obligation to bargain, and then tells them that it will not honor that obligation to bargain, such conduct intefers with the Section 7 right of employees to bargain through their chosen representative. See also *Kessel Food Markets*, 287 NLRB 426, 429 (1987), enfd. 868 F.2d 881, 884 (6th Cir. 1989), and *Fall River Dyeing*, supra at 40.

2. The Respondent has raised a due-process exception to the judge's finding that it violated Section 8(a)(5) and (1) through its unilateral implementation of new terms and conditions of employment for unit employees and the judge's recommendation that the Respondent be ordered to reinstate the status quo ante. The Respondent argues that it had inadequate notice, i.e., that the unilateral change findings and the status quo ante remedy are impermissible because the complaint did not specifically allege that the General Counsel would be seeking relief for unilateral changes.

We find that the General Counsel did give the Respondent adequate notice. The complaint alleged, and the Respondent denied in its answer, that the Respondent had a bargaining obligation as a *Burns* successor. It was in this context during the hearing that the counsel for the General Counsel stated at the close of his opening statement:

[4] See *Burns*, supra at 294–295: ''[T]here 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.''

> We would also add, for the General Counsel, that as part of a remedy in the case we believe that since the employer has not recognized the union, has not made any attempts to contact the union, to notify the union of any changes, *because [of] the way it took over its business the remedy should be that it should restore the status quo ante, as it existed prior to the Respondent taking over as a successor*. [Emphasis added.]

The judge then asked counsel for the General Counsel if he was claiming that the Respondent had made unilateral changes. The judge received an affirmative answer. In these circumstances, and because the unilateral changes are closely related to the complaint's successorship allegations, we reject the Respondent's contention that it had insufficient notice and opportunity to litigate the unilateral changes and the remedy[5] sought for them by the General Counsel.

3. Turning to the merits, we agree with the judge that the Respondent violated Section 8(a)(5) by unilaterally changing its unit employees' wages and benefits on and after December 4, 1989. We find, based on employee Kublbeck's credited testimony, that the Respondent, in late November 1989, indicated its intention to retain its predecessor's entire work force. We further find that the Respondent, although on timely notice that its *Burns* right to set initial employment terms was in issue, failed to present evidence that it had informed unit employees that the terms and conditions of employment would differ from those under Mason & Parker. Based on these facts, we agree with the judge that the Respondent brought itself within the special circumstances that *Burns* indicated would oblige a successor employer to maintain the preexisting terms and conditions of employment while it bargains with the incumbent union.

In *Spruce Up Corp*., 209 NLRB 194 (1974), the Board considered the parameters of the ''perfectly clear'' exception to the *Burns* rule that a successor is entitled to set initial terms of employment. In that case, the Board held that the exception was inapplicable in a situation in which the successor declared its intention to hire the predecessor's employees and at the same time offered continued employment only on different terms. But the Board also stated in *Spruce Up* that the ''perfectly clear'' exception would apply if the successor misled employees into believing that they would all be retained without change in their terms and conditions of employment or when the successor failed to announce clearly its intent to alter terms and conditions prior to offering employment to incumbent employees. Id. at 195.

While the record reveals the Respondent's intent to retain all the incumbent employees, it is devoid of any evidence of an offer of employment conditioned on their accepting new terms. In fact, the credited testimony shows that Flanagan told the Mason & Parker employees that the wages and benefits would not change.[6] Accordingly, we conclude that this case falls within the *Burns* exception because the Respondent failed to take advantage of its *Spruce Up* opportunity to ''clearly announce'' new terms before inviting the predecessor's employees to accept employment. Consequently, the Respondent was obligated to bargain with the Union before making any changes in existing terms and conditions of employment.[7] By unilaterally discontinuing certain benefits and failing to grant a January 1990 wage increase, the Respondent failed to honor its bargaining obligation and thereby violated Section 8(a)(5).

As noted above, the Respondent, on January 10, 1990, declined to recognize the Union. The Respondent asserts that it had a good-faith doubt of majority status. This asserted doubt was based on statements from two employees between January 5 and 10. However, that claim must be assessed in the context of the Respondent's antecedent unfair labor practices–the 8(a)(1) statement about operating nonunion and the 8(a)(5) unilateral changes. In such circumstances, the Respondent is not privileged to rely on an assertion of doubt as a basis for its failure to recognize the Union.

Accordingly, we agree with the judge that the Respondent, as a *Burns* successor, further violated Section 8(a)(5) by refusing to recognize the Union.

We adopt the judge's remedy and shall order the Respondent to rescind all adverse unilateral changes from the terms and conditions of employment that existed immediately before it became Mason & Parker's successor and to make the employees whole.[8]

ORDER

The National Labor Relations Board orders that the Respondent, Level, a Division of Worcester Manufac-

[5] See *N.C. Coastal Motor Lines*, 219 NLRB 1009 (1975), enfd. 542 F.2d 637 (4th Cir. 1976).

[6] Also, Flanagan testified that he told the supervisors who actually processed the hiring of the predecessor's employees to tell the employees ''nothing except that they would be extended an opportunity to work for'' the Respondent. Flanagan also stated that he did not tell the supervisors to discuss wages or benefits with the employees during the hiring process because ''that was all covered'' in his preemployment meeting with employees in late November.

[7] *Blitz Maintenance*, 297 NLRB 1005 (1990); *Kirby's Restaurant*, 295 NLRB 897 (1989).

[8] We agree with the Respondent that the judge's reliance on *State Distributing*, supra, and *U.S. Marine Corp*., supra, is misplaced. Unlike those cases, this case does not involve an employer whose violation of Sec. 8(a)(5) is grounded on the uncertainties created by a deliberate avoidance of successorship through discriminatory hiring. Here, there is no violation of Sec. 8(a)(3) and the Respondent does not contest its successorship status. Nothing in our Order is to be construed as requiring rescission of any wage increase or other benefits that have been granted the unit employees.

turing, Inc., Winchendon, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with Local 154–136 BFW, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed by the Respondent at its Winchendon, Massachusetts facility, excluding office and clerical employees, professional employees, executives, foremen and all supervisory employees as defined in the Act.

(b) Unilaterally changing rates of pay, wages, hours, and other terms and conditions of employment for the unit employees.

(c) Advising unit employees that it anticipated operating its plant nonunion.

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

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

(a) Recognize and, on request, bargain collectively with the Union as the exclusive representative of the Respondent's employees in the above unit, with respect to the rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed agreement.

(b) On request of the Union, rescind any departures from terms and conditions of employment that existed immediately before the Respondent's takeover from Mason & Parker Mfg. Co., Inc., retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and make the employees whole by remitting all wages and benefits that would have been paid in the absence of the unilateral changes from December 4, 1989, until it negotiates in good faith with the Union or to impasse. The reimbursement of wages shall be computed as in *Ogle Protection Service*, 182 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall remit all payments it owes to the employee benefit funds and reimburse its employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), for any expenses resulting from the Respondent's failure to make these payments. Any amounts that the Respondent must pay in to the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Winchendon, Massachusetts plant copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 1, 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.

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

[9] 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.''

APPENDIX

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

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

WE WILL NOT refuse to recognize and bargain in good faith with Local 154–136 BFW, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All production and maintenance employees employed by the Employer at its Winchendon, Massachusetts facility, excluding office and clerical employees, professional employees, executives, foremen and all supervisory employees as defined in the Act.

WE WILL NOT unilaterally change your rates of pay, wages, hours, and other terms and conditions of employment.

WE WILL NOT advise you that we anticipate operating our plant nonunion.

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

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive representative of the unit employees 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 agreement.

WE WILL, on request of the Union, cancel any departures from terms and conditions of employment that existed immediately before our takeover of Mason & Parker Mfg. Co., Inc., retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans. WE WILL make employees whole by remitting all wages and benefits that would have been paid in the absence of such unilateral changes from December 4, 1989, until we negotiate in good faith with the Union to agreement or to impasse, with interest. WE WILL remit any payments we owe to benefit funds and reimburse our employees for any expenses resulting from our failure to make the required payments.

LEVEL, A DIVISION OF WORCESTER MANUFACTURING, INC.

Avron J. Herbster, Esq., for the General Counsel.
Stephen T. Fanning, Esq., of Springfield, Massachusetts, for the Respondent.
Keith E. Sweeney, Esq., of Gardner, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF CASE

LOWELL M. GOERLICH, Administrative Law Judge. The original charge in this case filed by Local 154–136 BFW, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO (the Union) on January 23, 1990, was served by certified mail on Level, a Division of Worcester Manufacturing, Inc. (the Respondent), on January 26, 1990. An amended charge filed by the Union on February 26, 1990, was served by certified mail on Respondent on February 27, 1990.

A complaint and notice of hearing was issued on March 16, 1990. It was alleged in the complaint that the Respondent, as a successor employer, has failed to recognize and bargain with the Union as an appropriate unit in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

The Respondent filed a timely answer denying that it had engaged in the unfair labor practices alleged.

The matter was heard on December 4 and 5, 1990, at Boston, Massachusetts. Each party was afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, to argue orally in the record, to submit proposed findings of facts and conclusions, and to file briefs. All briefs have been carefully considered.

On the entire in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

I. BUSINESS OF RESPONDENT

At all times material, Respondent, a corporation with its principal office and place of business in Worcester, Massachusetts, and with an office and place of business in Winchendon, Massachusetts (Respondent's Winchendon facility) has been engaged in the manufacture and sale of restaurant and institutional furniture and related products.

During the 12-month period ending January 31, 1990, Respondent, in the course and conduct of its operations described above, sold and shipped from its Worcester, Massachusetts facility products, goods, and materials valued in excess of $50,000 directly to points outside the Commonwealth of Massachusetts.

Based on a projection of the operations at its Winchendon facility since on or about December 1, 1989, at which time Respondent commenced its operations, Respondent, in the course and conduct of its operations described above, will annually sell and ship from its Winchendon, Massachusetts facility products, goods, and materials valued in excess of $50,000 directly to points outside the Commonwealth of Massachusetts.

The Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR UNION INVOLVED

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

III. THE UNFAIR LABOR PRACTICE

The Facts

On December 1, 1989, the Respondent (the buyer) executed an Asset Purchase Agreement with Mason & Parker Mfg. Co., Inc. (the seller) and Warren Harris (the Shareholder). According to the agreement the seller was engaged ''in the business of manufacturing and selling certain types of furniture other than household furniture under the same trade names of 'Level' or 'Level of Winchendon' (the Purchased Business).''

The Respondent purchased ''all seller's assets, properties and rights used or usable in the conduct of the Purchased Business.'' Listed more specifically were:

> (a) All machinery, equipment, tools, dies, jigs, and other equipment listed on *Schedule 1.1(a)* hereto;
>
> (b) Raw materials, work-in-progress, supplies and finished goods in the inventory of Seller associated with the Purchased Business with respect to which Buyer notifies Seller from time to time of Buyer's need therefor;
>
> (c) Except as set forth in *Schedule 1.1(c)* hereto, any and all sales orders with respect to the Purchased Business outstanding on the Closing Date;

(d) Any and all rights of Seller with respect to patents, patent applications, trade names, service marks, trademarks, servicemark and trademark registrations and applications therefor, licenses, franchises and other assets of like kind relating to the Purchased Business or its products, including, without limitation, Seller's rights with respect to the trade names ''LEVEL'' and ''LEVEL of Winchendon'';

(e) All of the operations books and records of Seller relating to the Purchased Business, including, without limitation, customer lists, lists of suppliers, mailing lists, files and delivery receipts relating to accounts receivable, business forms and stationery.

Mason & Parker ceased the operation of the purchased business described in the Asset Purchase Agreement and laid off its employees on December 1, 1988; the Respondent resumed operations for the next Monday, December 4, 1988, at the same location.

In the last week of November, according to Charles D. Flanagan, president of the Respondent, he met with their Mason & Parker employers Flanagan described the purpose of the meeting:

> The meeting was held downstairs in the manufacturing area during one of the breaks and the purpose was to indicate that I had been in negotiations with Mason & Parker relative to buying some of the assets.''

Present were Mason & Parker's production employees Kublbeck[1] and Clarence Boucher[2] and maintenance employee John Pace. Also present were Supervisors Roger LeBlanc and Kurt Kublbeck. Dini Harris also attended.

According to Flanagan, he told the employees that the Respondent would ''extend offers of employment for some experienced people'' and in answer to a question ''relative to the Union, that they were unionized there'' he said, ''We were nonunion in Worcester and I would expect that we would be able to operate in a nonunion environment in Winchendon.''[3]

James Kublbeck related that at the employer's meeting, among other things, Flanagan stated that

> It was mentioned that as of Friday, that day, that we all were going to be dismissed and all rehired under this plant.[4] Charles [Flanagan] was explaining that as far as the pays and benefits would not change.

On the following Monday, after the meeting, James Kublbeck signed an employment application and went to work for the Respondent doing the same work he had performed for Mason & Parker the prior week. The same was true of Boucher.

At the same time Mason & Parker surrendered the business to the Respondent and dismissed its employees, James Kublbeck and Boucher were the only production workers for Mason & Parker. Thereafter, the Respondent hired Francis Couture, December 8, 1989; Ryan Fitzmaurice, December 11, 1989; Jean Rivard, March 12, 1990, and Paul Breen, March 5, 1990. All the employees had been employees of Mason & Parker and were members of the Union. Each of the employees had been on a union dues checkoff while working for Mason & Parker. Dues had been checked off for Boucher, Couture, James Kublbeck, and Pace in December 1989. Couture was the union steward. Couture considered himself as the steward ''[a]s long as the union's in there, yes.'' Kublbeck was ''second and assistant steward.'' A labor agreement between Mason & Parker and the Union extended from July 15, 1987, to July 15, 1990. The agreement included a union-security clause. The Respondent had knowledge of the contract and the membership in the Union of the workers of Mason & Parker when it acquired the purchased business. When the Union learned of the Respondent's acquisition, it, by a letter dated December 8, 1989, requested that the Respondent bargain collectively with the Union for the employees it hired who had formerly worked for Parker and Mason. The Respondent declined. Appropriate charges were filed by the Union.

In addition to Boucher and Kublbeck the Respondent hired Roger LeBlanc as a supervisor of a portion of the manufacturing operations and Kurt Kublbeck as supervisor in manufacturing. Both had performed substantially the same work for Mason & Parker. The Respondent also hired Dini Harris for customer service work. She had also worked for Mason & Parker. According to Flanagan, Boucher and James Kublbeck ''were told on Friday that they would be hired.''

James Kublbeck and Boucher commenced work with the Respondent with the same wages Mason & Parker had paid them. The health plan was also continued, however, Respondent did not continue the pension plan or paid vacations, although the employees now receive 2 weeks' vacation. The Respondent also continued the same ''holiday pattern'' but the employees received no funeral leave or ''well day,'' which is similar to sick leave. Although the employees received a raise during mid-1990 they did not receive the contractual wage increase due January 1, 1990, of 20 cents per hour under contract. The wages and working conditions of the Respondent's employees were established unilaterally.

At Level, a Division of Worcester Manufacturing, in the same area in which Mason & Parker had been operating, the Respondent manufactured ''molded plywood booth assemblies and tables and bases for restaurant tables predominantly'' and some chair assembly. To make these products Respondent used ''glueing machines, presses, saws, shapers'' which it purchased from Mason & Parker. The above-mentioned products that had been made by Mason & Parker continued to be manufactured by the Respondent immediately when it commenced operations at the Mason & Parker premises. About 10 days after acquisition the Respondents purchased the work in progress of Mason & Parker. The Respondent leased 23,000 square feet of Mason & Parker's facility, space used by Mason & Parker.

According to Flanagan, the Respondent acquired ''about 150'' customers from Mason & Parker with which the Respondent now does business.

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[1] Kublbeck was employed for about 14 years.

[2] Boucher was employed 9-1/2 years.

[3] On January 10, 1990, Flanagan addressed a letter to the Union in which he wrote, ''I met with several of the experienced people, explained our business intentions and that we anticipated trying to rebuild a business in a nonunion environment. A few of the previous employers accepted employment with the new company.'' G.C. Exh. 10.

[4] According to Boucher, ''He [Flanagan] said that we were going to be laid off and then in turn rehired come Monday.''

Conclusions and Reasons Therefor

The Respondent maintains that the complaint should be dismissed because the employer is not a successor under *Burns*;[5] that in the alternative a substantial and representative complement of employees did not exist on the date of the transfer of assets, and that the Employer had a sufficient objective basis for a reasonable doubt of the Union's majority status. I find that these contentions are not well taken for the reasons which follow.[6]

The Respondent is a successor to Mason & Parker (see *NLRB v. Burns Security Services*, supra) because the Respondent's operations are essentially the same business as its predecessor; the Respondent is occupying the same location; the Respondent is utilizing the same work force and skills; the Respondent's jobs and working conditions are substantially the same; the Respondent is employing the same supervisors; the Respondent is using substantially the same machinery and equipment; and the Respondent is producing substantially the same products for substantially the same customers. Any alleged changes in operation have not significantly altered the employees' working conditions, the employment relationship, and, correspondingly, the employees' expectations and needs in regard to representation. Cf. *USG Acoustical Products Co.*, 286 NLRB 1 (1987). Under these circumstances the ''employees who have been retained will understandingly view their job situations as essentially unaltered.'' Cf. *Fall River Dying Corp. v. NLRB*, 482 U.S. 27 (1987).

These facts meet the Board's test for determining successorship status, i.e., ''whether there is a substantial continuity in identity of the employing enterprise.'' *Inland Container Corp.*, 275 NLRB 378 (1985).

As a successor employer the Respondent was obligated to recognize the Union which represented its predecessor's employees, for at the time of the acquisition, the employer put to work a majority of union partisans in the continuing appropriate unit.[7] ''If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, than the bargaining obligation of Section 8(a)(5) is activated.'' *Fall River Dying Corp. v. NLRB*, supra.

The Supreme Court has said in *Fall River Dying Corp. v. NLRB*, supra at 39–40:

> If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may feel that there choice of union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace. In addition, after being hired by a new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. *In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor* or if they are inclined to blame the union for their layoff and problems associated with it.'' [Emphasis added.]

Additionally, the Respondent's claim that it should be excused from recognizing the Union because its hires were union defectors lacks persuasion in light of its representation to its employees that it would operate nonunion. Under these circumstances, it is likely that the employees would leave the Union to save their jobs. Nor may the Respondent draw an alleged good-faith doubt from a situation which it may well have created itself by its expressing to employees that its preference was to operate nonunion. Moreover, it was not until after Flanagan had expressed his antiunion views that he claimed he had heard some antiunion sentiment. Thus, not only was there reason for the employees to shun the Union as anticipated by the Supreme Court in *Fall River Dying Corp.*, supra, but employees were also subjected to a dissuasion from continuing their union affection because of the Respondent's expression of nonunion preference. Indeed the Respondent clinched its nonunion preference by refusing to recognize the union, by not recanting its antiunion position, and by actually operating nonunion. Under these circumstances, an employer could not expect an employee to stand with the union.

In the case of *NLRB v. Burns Security Services*, supra at 294, the Supreme Court opinioned:

> [t]here will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. [See also *U.S. Marine Corp.*, 293 NLRB 669 (1989); *State Distributing Co.*, 282 NLRB 1048 (1987).]

This case presents such an instance as is described in the Supreme Court's decisions. Thus, the Respondent was obligated to bargain with the union before it fixed conditions of employment for the predecessor's employees. Its unilateral changes in the working conditions of the employees hired from its predecessor were unlawful. Cf. *NLRB v. Katz*, 369 U.S. 736 (1962). Accordingly, the Respondent by unilaterally changing terms and conditions of employment and by unilaterally departing from existing terms and conditions of employment reflected in the collective-bargaining agreement between Mason & Parker and the Union violated Section 8(a)(5) of the Act. *State Distributing Co.*, supra; *U.S. Marine Corp.*, supra.

I further find that Flanagan's statement to employees of his anticipated operation of the Respondent nonunion restrained, interfered with, and coerced employees in their Section 7 rights and violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and it will effectuate the purposes of the Act for jurisdiction to be exercised.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees employed at Level of Winchendon, a Division of Worcester Manufacturing, Inc., as

[5] *Burns Security Services v. NLRB*, 406 U.S. 272 (1972).

[6] I have carefully examined the citations of the Respondent and find them not to support the Respondent's contentions.

[7] The appropriate unit was established in the contract.

successor to Mason & Parker Mfg. Co., Inc., constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by Respondent at its Winchendon facility, excluding office and clerical employees, professional employees, executives, foremen and all supervisory employees as defined in the Act.

4. At all times the Union has been the exclusive representative of all the employees in the above unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondent is a successor employer to Mason & Parker and by disavowing its bargaining obligations to the Union and departing from preexisting rates of pay and benefits without prior notification to and bargaining with the Union the Respondent violated Section 8(a)(5) and (1) of the Act.

6. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist and take certain affirmative action necessary to effectuate the policies of the Act. It is recommended that the Respondent be required to recognize and bargain with the Union in an appropriate collective-bargaining unit and, if an agreement is reached, to reduce the agreement to a written contract. In addition, it is recommended that Respondent cancel, on request by the Union, any departures from terms and conditions of employment, including rates of pay and benefits unilaterally effected and make whole the employees by remitting all wages and benefits,[8] that would have been made, including remittance of the payment the Respondent owes the benefit funds and reimbursement to unit employees for any expenses resulting from Respondent's failure to make such payments, absent the Respondent's unlawful conduct from December 4, 1989, until the Respondent negotiates in good faith to agreement or impasse.[9]

[Recommended Order omitted from publication.]

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[8] See *Kraft Plumbing & Heating*, 252 NLRB 891 (1980); *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[9] See *State Distributing Co.*, supra; *American Press*, 280 NLRB 937 (1986).