

**Fremont Ford Sales, Inc. d/b/a Fremont Ford and The East Bay Automotive Council and its Affiliated Local Unions; District Lodge No. 190, Local Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL-CIO; Auto, Marine and Specialty Painters Union, Local No. 1176; Teamsters Automotive Employees Union, Local No. 78, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.**<sup>1</sup>  
Case 32-CA-4866

July 28, 1988

### DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
JOHANSEN AND BABSON

On December 27, 1983, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed exceptions and a supporting brief.<sup>2</sup> The General Counsel filed a brief in support of the judge's decision and in answer to the Respondent's exceptions and brief. The General Counsel also filed limited cross-exceptions pertaining to the judge's failure to consider the complaint allegations involving the Charging Party's request for information submitted on September 13, 1982. The Charging Party, The East Bay Automotive Council and Its Affiliated Local Unions (the Unions), filed cross-exceptions<sup>3</sup> and a supporting brief. After the briefs were submitted, the Respondent filed a document entitled "Motion for Reopening of the Record and for Receipt of New Evidence." Thereafter, the General Counsel and the Unions filed memoranda in opposition to the Respondent's motion.<sup>4</sup>

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,<sup>5</sup> and

<sup>1</sup> On November 2, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

<sup>2</sup> The Respondent has requested oral argument. This request is denied as the record, the exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>3</sup> The Unions' cross-exceptions are identical to the General Counsel's limited exceptions.

<sup>4</sup> The Respondent's motion to reopen the record to receive certain documentary evidence is denied. Our examination of the record reveals that these proffered documents are irrelevant to the events of 1982 in question.

<sup>5</sup> The Respondent asserts, in essence, that the judge's resolution of credibility, findings of facts, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this claim is without merit. The Respondent's request for a rehearing before a different administrative law judge is denied. There is no basis for finding that bias and partiality existed merely because the judge refused to grant the Respondent's request for a continuance during the trial and resolved

conclusions, as modified, to modify his remedy, and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(1), (3), and (5) of the Act in connection with its 1982 takeover of a Ford dealership. As described below, we agree with the judge that the Respondent was a legal successor to its predecessor; that it was obligated to bargain with the Unions; that it unlawfully bypassed the Unions and unilaterally changed the terms and conditions of employment for its unit employees in several respects; that the Respondent's refusal on May 17 to employ the predecessor's employees was unlawful; and that its interviewing and hiring practices were unlawful.<sup>6</sup> We also adopt the other violations of Section 8(a)(1) found by the judge.<sup>7</sup> For the reasons below, however, we disagree with the judge to the extent he found that the Respondent was obligated to honor the last union contract between its predecessor and the Unions. We, finally, find that

important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, 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), enf'd 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>6</sup> We also agree with the judge's findings that the Respondent's inquiry about the applicants' intentions with respect to possible picketing by the Unions violated Sec. 8(a)(1) of the Act. In *Mosher Steel Co.*, 220 NLRB 336 (1975), enf'd 532 F.2d 1374 (5th Cir. 1976), the Board held that "where the record shows that at the time the questions about picketing were asked the Employer had a reasonable basis to fear an imminent strike and merely sought to ascertain the chances for keeping his business open, such inquiries are lawful [footnote omitted]." 220 NLRB at 336. *Accord. Certainteed Corp.*, 282 NLRB 1101, 1107 (1987). The Respondent here, however, did not have a lawful purpose in asking the applicants if they intended to honor a picket line established by the Unions. In this respect, the judge found important Supervisor Smith's testimony that job offers were not extended to individuals who initially expressed or indicated a reluctance to cross the Unions' picket line unless, at a later time, they indicated that they would be willing to cross the picket line. Smith's testimony shows that the inquiry about an applicant's picketing intentions was used by the Respondent in making its hiring selections and was not used to ascertain whether the Respondent could keep its operations going during the picketing. The inquiry was also accompanied by a requirement that future employees express a willingness to work "nonunion" as a condition of their retention. Cf. *Hedaya Bros.*, 277 NLRB 943 (1985) (questioning employees about their strike intentions constituted a violation of Sec. 8(a)(1)).

<sup>7</sup> The judge found that the Respondent violated Sec. 8(a)(5) and (1) when it gave false and misleading information to the Unions regarding the details of the dealership takeover. Because we find that the Respondent's bargaining obligation arose after these events occurred, we do not adopt the judge's findings that the Respondent violated Sec. 8(a)(5). He also found that the Respondent violated Sec. 8(a)(1) in the following two respects. First, on May 17 the Respondent refused to employ nonunion employees and required them to apply for work as part of an unlawful plan to defeat the Unions' status as the exclusive representative of the unit employees. Second, the Respondent told employees that its previously represented shop and service departments would be nonunion and that any employee wishing to work in those departments must sign an individual employment contract and cross the Unions' picket lines as a condition of hire.

the Respondent also violated Section 8(a)(5) and (1) when it failed and refused to comply with the Union's September 13, 1982 information request.<sup>8</sup>

Briefly stated, the relevant facts are as follows. Fremont Ford, Inc. (Fremont),<sup>9</sup> a California corporation, operated a Ford car and truck dealership in Fremont, California, from 1978 until May 17, 1982.<sup>10</sup> On May 17, after months of financial difficulties, Fremont sold the dealership to the Respondent and terminated its entire work force, including 22 unit employees working in its service, parts, and body shop departments who had been represented by the Unions. The Unions' last collective-bargaining agreement covering these employees was effective from August 20, 1980, through August 20, 1983.

The Respondent was specifically created under the Ford Motor Co.'s dealer development program to purchase and operate the Fremont dealership with Donald Barnes as the dealer operator/minority shareholder and Ford as the majority shareholder.<sup>11</sup> Steps to accomplish the dealership transfer to the Respondent began in mid-January. Barnes, then serving in several capacities for Fremont,<sup>12</sup> applied to participate in Ford's dealer development program. In March, after Barnes' application had been reviewed by various Ford personnel, the negotiations with a Ford representative occurred. These negotiations, covering the necessary financing, leasing, and takeover arrangements for the dealership sale, culminated in the granting of certain options on March 19. These options gave the Ford representative the right to enter into a buy-sell agreement with Fremont to purchase the dealership and the right to sublease certain property from Fremont's principal owners, Paul Brinkman and Leon Pettitt. The Ford representative also retained the right to assign these options to the corporation to be created under the dealer development program, viz, the Respondent. All these March arrangements were contingent on Ford's subsequent approval.

On April 22, Ford gave its approval to the deal struck by Fremont and the Respondent in March. The Respondent was then incorporated as a Delaware corporation on April 23. Between April 23 and May 17, corporate bylaws were adopted; corporate officers and directors were elected; and various licenses, permits, bank accounts, insurance,

and other items necessary to do business as a Ford dealership in California were obtained by the Respondent. On May 7 Ford accepted Fremont's resignation from the dealership operation, but Fremont continued its sales and service at the dealership through May 17. On May 7, a Ford sales and service agreement was executed on behalf of the Respondent, but there is no evidence that such agreement was utilized prior to May 19. On May 14, an inventory of the dealership's assets was taken by an outside company in final preparation of the dealership sale to the Respondent which took place the following week.

The following week was a busy period for the Respondent. On May 17, the Respondent entered into a dealer development program agreement with Ford; issued preferred stock to Ford and common stock to Barnes; accepted a secured loan from Ford; and appointed Barnes to serve as the dealership's general manager and operator. On the same date, money among the interested parties to the dealership sale exchanged hands. On May 19, the Ford representative assigned the March 19 options to the Respondent. The Respondent then exercised these options by executing the buy-sell and lease agreements on May 20. During this period, Fremont's property subject to the sale was transferred to the Respondent. On May 19, using Fremont's trade name, the Respondent opened for business, providing sales and services comparable to those which had been provided by Fremont.

Several months in advance of the dealership transfer, Barnes had made plans to operate the dealership on a nonunion basis. Except for his remarks in January at a grievance meeting,<sup>13</sup> Barnes kept his plans secret from the Fremont unit employees. He even went so far as to instruct his parts and service director, Larry Smith, to conceal or make false or misleading statements to the Fremont unit employees who inquired about the working conditions to be expected under the Respondent's control of the dealership. Not until after the hiring process had begun, when personal interviews were conducted on May 17 and after the required written job applications had already been submitted early in May, did the Respondent first inform the Fremont unit employees that there

<sup>8</sup> The judge inadvertently failed to pass on this complaint allegation even though it was fully litigated.

<sup>9</sup> Fremont is not a named party to these proceedings.

<sup>10</sup> All dates are in 1982 unless otherwise indicated.

<sup>11</sup> Under this program, the dealer operator/minority shareholder could use future profits of the dealership to buy Ford's corporate interest.

<sup>12</sup> Barnes was corporate president, director, 20-percent owner, general manager, and operator of Fremont.

<sup>13</sup> Based on credited testimony, the judge found that after the announcement of an adverse grievance ruling against Fremont in January, Barnes said to the Unions' representatives in attendance:

You guys are not going to be around here. There's no union going to run my store. . . . I'll take care of that when I become the sole owner.

The judge further found that Supervisor Smith later mentioned the above remarks made by Barnes to employee Darrell Cooper by explaining that Barnes was "mad enough to blow the whole union out of the water"

would be significantly different employment conditions.

On May 17, former Fremont unit employees were interviewed for possible employment with the Respondent. The next day, in accord with its recent newspaper advertisements, the Respondent interviewed job applicants who were not recently associated with Fremont. A total of more than 100 applicants were screened by the Respondent's supervisory staff, all of whom were formerly Fremont supervisors.

During the interviews, the Respondent asked questions concerning whether the applicants would work in a nonunion setting under employment conditions that differed in several ways from the terms established by its predecessor's last union contract. These new terms included a flat-rate pay scale instead of the hourly pay scale. The applicants were told that they would be required to sign a document showing their willingness to work under the new employment conditions. Having learned of probable picketing by the Unions, the Respondent also asked the job applicants if they were willing to cross a picket line. The Respondent further guaranteed the applicants a 40-hour weekly pay while any picketing occurred.

The Respondent eventually hired 10 employees, all former Fremont unit employees, to begin work on May 19. Those hired were expected to cross a picket line, work a flat-rate pay scale, and were subject to several employment conditions which differed from the terms of the last union contract between Fremont and the Unions.

After May 19, the Respondent continued to hire employees as its needs increased. On September 15, after the Respondent had received the Unions' September 13 written demand for recognition, discussed, *infra*, 11 of the 26 employees in the Respondent's service, parts, and body shop departments were former Fremont unit employees. On September 27, the date when the Respondent claims that it attained a full employee complement, 28 employees were in those departments, a majority of whom had not been formerly associated with Fremont.

Despite Barnes' plans to operate the dealership without the Unions, the Unions met with the Respondent on two occasions, on May 6 and 17. By letter dated May 3, Barnes had offered to discuss with the Unions the effect of the sale on those dealership employees then represented by the Unions.<sup>14</sup> In response to this letter, Union Business

Representative Bobo met with Barnes on May 6. In that meeting, Bobo asked what it would take to keep the dealership a "union store." Bobo and Barnes then discussed three subjects raised by Barnes. The subjects were employee seniority for vacation purposes, retention of unit employees, and a flat-rate pay system for unit employees.<sup>15</sup> No agreements on these subjects were reached. Regarding the retention of unit employees, Barnes suggested that there were "three or four" employees, without giving any names, that he might not want to retain. Barnes then agreed to contact Bobo when the transfer of the dealership assets to the Respondent took place.

On May 17, accompanied by Union Representative Day, Bobo again visited Barnes at the dealership. Day told Barnes that he and Bobo were there to get a union contract signed. Barnes replied that he had no evidence that the Unions represented any of the Respondent's employees and it would be a couple of days before the Respondent would be in operation. The union representatives then left the dealership.

The Unions' next contact with the Respondent came 2 days later. After the Respondent opened for business on May 19, the Unions commenced picketing at the dealership and picketed for approximately 2 months.<sup>16</sup>

After the picketing ceased, the Unions sent a letter dated September 13 and received by the Respondent on September 15. In this letter, the Unions demanded that the Respondent honor its predecessor's contract or, alternatively, recognize and bargain with them on the basis that the Respondent was a legal successor to Fremont. The Unions also requested that they be immediately supplied with the following information:

1. The names, addresses, job classifications, wages and benefits, dates of employment, and hours worked per week for all employees

not always the same. These different predictions can be expected in view of the complexities involved in such a dealership transfer. We do not view these dates as inconsistent but merely approximations when the transfer could be expected to occur. In any event, we find the Unions had sufficient notice that this changeover was to take place. This, however, does not detract from our general agreement with the judge's finding that the Respondent otherwise gave false and misleading information to the Unions regarding the details of the dealership takeover.

<sup>15</sup> According to the credited witness testimony, the latter topic in some circles is synonymous with a nonunion operation since several unions in this industry do not want a flat-rate pay system for the employees they represent.

<sup>16</sup> The record gives very little description of this picketing activity. What actually appeared on the picket signs is not altogether clear. There is some evidence that the signs displayed something to the effect that the Respondent was unfair to the Unions. The Unions' letter of September 13 asserts that the Unions engaged in the picketing to protest the Respondent's nonunion status and the failure to pay area wage and benefits standards. The Unions' stated purpose for the picketing was not disputed by the Respondent.

<sup>14</sup> Barnes' letter designated May 20 as the date expected for the Respondent's ownership of the dealership to commence. Contrary to the judge, we do not find it critical that all dates for the transfer given the Unions and the employees by the Respondent and its predecessor were

within the bargaining unit who had worked for the Company since May 15.

2. The names of the then-current owners and officers of the Company and the percentage of ownership of the owners.

3. A copy of the purchase agreement, the May "sale of assets" agreement, the terms of the sale, and the incorporation papers of the Company.

4. A description of all benefits (holidays, vacations, sick leave, jury leave, health and welfare, retirement, etc.) to which employees were entitled, the dates when these benefits were implemented, and a copy of any and all benefit plan descriptions.

5. The status of all current owners and officers of the Company from June 15, 1981 to May 20, 1982.

By letter dated September 20 the Respondent refused all the Unions' demands. The Respondent took the position, inter alia, that it was not a successor to Fremont and that there was no existing relationship between it and Fremont requiring the submission of the requested information to the Unions.

With respect to his 8(a)(5) findings, the judge found that the Respondent was a successor to Fremont under four different theories. His first theory, which is the basis of his recommended remedy, used the principles of *East Belden Corp.*<sup>17</sup> and its progeny<sup>18</sup> to conclude that successorship attached in January, or on March 19 at the latest, based on Barnes' control of the dealership, even though the transfer of assets actually occurred much later, in May. The judge's first alternative theory for successorship was grounded on a finding that the Respondent voluntarily recognized the Unions in May as shown by its correspondence with the Unions and the subsequent May 6 meeting with Union Representative Bobo. Then, in line with his *East Belden* and voluntary recognition theories, the judge found that the Respondent had "assumed" the union contract of its predecessor because the Respondent had honored and applied this contract prior to May 17. The judge thus found that the Respondent had an obligation to apply the union contract to its employees after May 17 and was not permitted to make the unilateral changes in working conditions and engage in the direct dealing with the unit employees on May 17.

<sup>17</sup> 239 NLRB 776 (1978), enfd mem. 634 F.2d 635 (9th Cir. 1980). The concept developed by this case permits successorship to attach before actual complete takeover by the purchaser if the purchaser enters the property during an escrow period and utilizes a majority of the seller's employees during this escrow period.

<sup>18</sup> See, e.g., *Sorrento Hotel*, 266 NLRB 350 (1983).

The judge's second alternative theory for successorship can be stated as follows: "but for" an unlawful hiring process the Respondent would have had almost a full employee complement with a majority composed of its predecessor's employees on May 19. In support of this theory, the judge cited *Potters Chalet Drug*, 233 NLRB 15 (1977), enfd. mem. 584 F.2d 980 (9th Cir. 1978), in conjunction with his findings that the Respondent illegally refused to employ all 22 unit employees on May 17 and discriminatorily refused to hire 12 of them when the dealership reopened on May 19. The third alternative theory of the judge found successorship because the Respondent had a "representative complement" of employees (a majority of whom were former Fremont employees) on May 19, when the Respondent opened for business to the public, even if a "full complement" was not attained until 4 months later as claimed by the Respondent. Under the judge's second and third alternative theories, the Respondent would not be obligated to honor the contract between Fremont and the Unions, but would be required to bargain with the Unions as the exclusive representative of the unit employees.

Having set forth the judge's four theories of successorship, we shall consider them in the order designated by the judge's decision.

Regarding his first theory, the judge misconstrued the criteria necessary for the *East Belden* principles to apply. In *East Belden*, the prospective buyer was in existence and executed a written purchase agreement to buy the restaurant. Then, the buyer entered the property and took control of the restaurant during an approximate 2-month escrow period until the permanent transfer of the restaurant occurred. During escrow, the buyer retained a majority of the seller's unit employees who had been represented by the union in *East Belden*. Evidence of the buyer's control was reflected in the change in the restaurant's operating records to show that the buyer was the named operator during the escrow period. The buyer also paid various operating expenses of the restaurant, including the manager salaries and employee wages, during the escrow period. The buyer was the party to reap the profits or losses of the restaurant during the escrow period. Under these circumstances, the buyer was deemed to have acquired the obligations of a successor employer during escrow.

In *Sorrento Hotel*, supra, the new lessees executed a written interim management agreement to operate the hostelry while they awaited a long-term lease with the owner to begin. During this interim period, the lessees entered the property, took control of managing the property, obtained and uti-

lized the necessary licensing and permits to manage the property, promised to indemnify the owner for any mismanagement, and utilized the owner's employees. The lessees incurred the business' operating expenses, including the compensation of the manager, who was designated by the lessees and who reported directly to the lessees. As with the buyer in *East Belden*, the Board marked successorship when the transitional period began, which meant that the lessees' successorship began with their interim management instead of when their long-term lease began.

The salient facts in *East Belden* and *Sorrento Hotel* triggering successorship status before the purchase was final or the lease commenced are that there were written agreements to purchase or lease and an escrow or interim management period officially established for the prospective buyer or lessee to take control. Here there was no written agreement to purchase or lease the dealership in existence in January or on March 19 and no escrow or transitional period. The execution of the buy-sell and lease agreements by the Respondent and the transfer of the dealership property occurred almost simultaneously and there was no interim agreement for the Respondent to operate the dealership.

The judge mischaracterized the import of the events in January and on March 19. The judge misconstrued the January plans to "apply" to buy the dealership and the March 19 "option" agreements when he found them to be equivalent to, and having the same legal effect, as written purchase and lease agreements. In January, the parties were in the exploratory and tentative planning stages, no matter how confident they may have been of dealership transfer in the future. No written agreements existed; only an application was on file. The Respondent did not exist prior to April 23, and it was not open for business until May 19. In January, the sales and services of the dealership were handled by the Respondent's predecessor, and the Respondent did not even have a Ford sales and service agreement at the time to be considered a Ford dealership. The dealership's operating records, licenses, permits, and operating expenses were those of the Respondent's predecessor. In January, the Respondent was not funded.<sup>19</sup> The supervisory staff, including General Manager Barnes, still reported to the Respondent's predecessor. Barnes' scope of authority remained basically the same as his authority prior to January. If anything, some restrictions on financial spending were placed on

<sup>19</sup> A bank account for the Respondent was not established until May. The record shows that no funds were drawn on the account prior to May 19 to operate the dealership.

Barnes after he submitted his application to the Ford's dealer development program. In March, the situation did not change when negotiations occurred and the March 19 options were given the Ford representative, which the judge treated as fiction, disregarding basic contract-law principles.

To summarize, the facts underlying the Respondent's activity in January and on March 19 are distinguishable from the facts presented by the *East Belden* and *Sorrento Hotel*-type of case. For this reason, we do not adopt the judge's finding of successorship premised on the *East Belden* theory.

Turning to the judge's next theory of successorship, the one premised on voluntary recognition, we find that the judge wrongly concluded that an invitation to discuss the sale with the Unions coupled with a subsequent discussion on May 6 with Union Representative Bobo rose to the level of extending recognition to the Unions. Rather, the more reasonable interpretation of Barnes' conduct reflects just the opposite conclusion. Even though Barnes expressed a general willingness to discuss three subjects in terms of the Unions' desires to keep the dealership a "union store," the May 6 meeting was called on behalf of Fremont in an effort to fulfill its bargaining obligation to the Unions. During the meeting, Barnes never stated that the Respondent actually recognized the Unions as the bargaining representative of its prospective employees. At most, Barnes indicated that the Unions should check back with him at a later date. This latter statement is equivocal at best, especially when viewed in the context of Barnes' earlier remarks in January at a grievance meeting to the effect that he desired to operate the dealership in the future on a nonunion basis.

To support his second alternative, "but-for" theory, the judge found that the Respondent illegally, inter alia, refused to employ all 22 unit employees on May 17 and discriminatorily refused to rehire 12 of them when the dealership reopened on May 19. The judge found a prima facie case of discrimination based on Barnes' declared intention to have the dealership operate nonunion under the Respondent's ownership, and his requirements that employees express a willingness to cross a picket line and work "nonunion" as a condition of their retention as well as his insistence that prospective employees sign individual employment contracts. We agree and find the record does support a prima facie case of a tainted hiring process, and that the Respondent failed to meet its burden under *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981). We, therefore, adopt the judge's 8(a)(3) findings, as described above.

In *Love's Barbeque Restaurant No. 62*, 245 NLRB 78 (1979), enfd. in pertinent part 640 F.2d 1094 (9th Cir. 1981), the successor did not hire the predecessor's employees based on unlawful considerations. In view of the successor's unlawful refusal to hire the former company's employees, which constituted a violation of Section 8(a)(3) of the Act, the Board determined that the successor further violated Section 8(a)(5) of the Act. "But for" the successor's unlawful conduct, the union's status as the exclusive bargaining representative would have survived the successor's takeover of the business. *Love's Barbeque*, supra at 82. Accord: *State Distributing Co.*, 282 NLRB 1048 (1987).

Applying the principles of *Love's Barbeque* here, we arrive at the same result reached by the judge, that is, the Unions' presumption of majority status would have continued had the 12 discriminatees been hired to begin work on May 19. Since we agree with the judge's finding that all the other elements of successorship are present, more fully discussed, infra, we adopt, as described above, his second alternative, "but for" successorship theory.

With respect to the judge's representative complement theory, we begin our discussion with *Fall River Dyeing Corp. v. NLRB*.<sup>20</sup> In that case, the U.S. Supreme Court recently reaffirmed the Board's approach to determining whether a successorship relationship exists between two entities. In particular, the Court held that the Board's "substantial and representative complement" rule is reasonable in the successorship context.<sup>21</sup>

The Board's traditional test for determining if a purchaser has a duty to continue the bargaining relationship established by its predecessor is whether there is a substantial continuity in the employing enterprise.<sup>22</sup> A comparison of business operations, plant, work force, jobs, working conditions, supervisors, machinery, equipment, production methods, and product or service is made to ascertain if continuity exists.<sup>23</sup>

In comparing the Respondent to its predecessor, the judge found sufficient operational continuity. As seen from the record, after a 1-day hiatus, the Respondent opened for business to sell and service vehicles at the same location with the same supervisory staff and with the same nonsupervisory job classifications. Problematic for the judge was whether a sufficient continuity in the employee complement existed on which to premise majority status for the Unions. The judge found that a "substantial and representative complement" existed

when the Respondent officially opened for business to the public with 10 former Fremont unit employees on hand. The judge relied, inter alia, on the principles set forth in *Pre-Engineered Building Products*, 228 NLRB 841 (1977), enfd. 603 F.2d 134, 136 (10th Cir. 1979), and *Premium Foods*, 260 NLRB 708 (1982), enfd. 709 F.2d 623, 628 (9th Cir. 1983), which were favorably cited by the Court in *Fall River Dyeing Corp. v. NLRB*, supra.

To find a concomitant bargaining duty on the part of the Respondent under this successorship theory, there must be an outstanding bargaining demand made by the Unions. In the instant case, the Unions arguably demanded recognition on three occasions—on May 6 when Union Representative Bobo met with General Manager Barnes, on May 17 when Union Representatives Bobo and Day approached Barnes to sign a contract on behalf of the Respondent, and on September 15 when the Respondent received a written demand for recognition from the Unions. On the first occasion, the Respondent was neither legally nor functionally operational and had no unit employees on its payroll. See *Spruce Up Corp.*, 209 NLRB 194 (1974). The dealership was still under the control of the Respondent's predecessor; the employees were the predecessor's. The fact that Barnes, who intended to be the new operator, was on the scene still performing his job as the predecessor's general manager did not divest the predecessor's control. On the third occasion, the Respondent had been in control for some 4 months; however, a majority of its employees were not then former unit employees of the predecessor unless the 12 discriminatees who were not hired are considered. On the second occasion, however, the actual takeover of the dealership had begun. As previously discussed, on May 17, the Respondent had entered into a dealer development program agreement with Ford; had issued preferred stock to Ford and common stock to Barnes, and had accepted a secured loan from Ford; had appointed Barnes to serve as the dealership's general manager; had exchanged money with the other interested parties to the dealership sale; and had interviewed former Fremont unit employees and hired its supervisory staff. Thus, there was a viable demand for recognition from the Unions on 17 May.<sup>24</sup> The Union's demand of May 17 constituted a "continuing demand" under *Fall River Dyeing Corp. v. NLRB*, supra at 54, which triggered a bargaining obligation on May 19 when the Respondent opened for business. See *Bachrodt*

<sup>20</sup> 482 U.S. 27 (1987)

<sup>21</sup> Id. at 52-54.

<sup>22</sup> Id. at 42-46.

<sup>23</sup> Id.

<sup>24</sup> Here, the Unions made clear after May 17, as shown by the picketing activity, that in their view the Respondent had a bargaining obligation

*Chevrolet Co.*, 205 NLRB 784 (1973), enfd. 515 F.2d 512 (7th Cir. 1975), cert. denied 423 U.S. 927 (1975).

Having analyzed the judge's four successorship theories, we now treat the 8(a)(5) allegation relating to the Respondent's implementation of new terms and conditions of employment for unit employees. Since the judge found the Respondent had assumed the union contract, he did not have to squarely resolve whether the Respondent was otherwise free to set initial employment terms under the teachings of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). Because we have rejected the judge's finding that the Respondent assumed the union contract, we must decide this issue.

In *Burns* the Supreme Court stated:

Although a successor employer 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. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act, 29 U.S.C. § 159(a). [406 U.S. at 294-295 (emphasis added).]

The pivotal language of *Burns* is "perfectly clear." Several Board decisions have interpreted that language and their interpretations provide us with some guidance here. In *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 interpreted that language not to require that all employees had to be hired. The Board was influenced by the fact that, prior to assuming control, the successor had indicated an intention to retain the predecessor's employees and then hired enough to make it evident that the union's majority status would continue. In that case, as well as in *Howard Johnson Co.*, 198 NLRB 763 (1972), enfd. 496 F.2d 532 (9th Cir. 1974), and *Bachrodt Chevrolet Co.*, 205 NLRB 784 (1973), enfd. 515 F.2d 512 (7th Cir. 1975), cert. denied 423 U.S. 927 (1975), the predecessor's employees had been hired by the successor employer prior to the announcement of the changes in employment terms that had not been a part of the initial terms of rehiring. In *Bachrodt*, for example, the successor employer did not make the predecessor employees aware of the proposed

changes when it invited them to apply for work and submit written job applications or when they were interviewed. In all three cases the Board found an 8(a)(5) violation applying *Burns*.

On the other hand, in *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), the Board did not find a violation of Section 8(a)(5) because it found that the facts did not fall within the parameters of the "perfectly clear" exception enunciated in *Burns*. In *Spruce Up* the successor employer expressed a general willingness to hire the former employer's employees, but at the same time indicated that such employment was conditioned on their willingness to accept the terms of employment set by him. In particular, the successor employer distributed job applications which set forth the new rates of commission he intended to pay and requested that all those predecessor employees who desired to work on *that* basis submit the application. The Board stated:

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. . . .

We believe that the caveat in *Burns*, therefore, should be restricted 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, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. [Fn. omitted. 209 NLRB at 195.]

Since *Spruce Up* the Board has adhered to this distinction based on when the successor employer announces its offer of different terms of employment in relation to its expression of intent to retain the predecessor's employees unless the successor has misled them. See *Starco Farmers Market*, 237 NLRB 373 (1978) (and cases cited therein).

In our view, the facts of the instant case fall within the Court's caveat in *Burns*, and we conclude that the Respondent forfeited the right to set initial terms. The judge found that when Barnes met with Union Representative Bobo on May 6 and indicated that he had doubts about the retention of only a few of the current employees it was

“perfectly clear” under *Burns* that Barnes planned to retain a majority of Fremont employees. The record shows that employee William Deetz and Marvin Wiggins were even told by Supervisor Smith prior to May 17 that they would be retained when the Respondent took over the dealership operations. Smith’s promise of employment was given before the Respondent later announced, in the individual employee interviews, its new employment terms and conditions. The record further shows that when Darrell Cooper received his job application, Smith assured him that nothing was going to change, including having union representation, when the Respondent took over the dealership. The judge credited all of his testimony and further found that here Barnes embarked on a misinformation campaign. Barnes instructed his supervisors to conceal or make false or misleading statements to the Fremont employees who inquired about the working conditions to be expected under the Respondent’s control. Barnes gave the Unions false or misleading information about his true intentions to change more than just the three subjects discussed at the May 6 meeting. Nor does the Respondent’s May 16 want ad, soliciting outside employment applications and announcing that the Respondent would operate a flat-rate shop, negate the earlier misinformation given directly to the predecessor’s employees. In this regard, there is no indication that the predecessor’s employees saw the ads. Indeed, it is unlikely they would have been looking at employment ads after being reassured by the Respondent that nothing would change once it took over the operation. It was not until after the hiring process had begun that the Respondent first informed the Fremont employees that there would be significantly different employment conditions. In addition, the Respondent’s interviews were tainted by conditioning the hire of Fremont employees on their willingness to abandon union representation and cross the Unions’ picket lines. Finally, the Respondent’s refusal to employ the Fremont work force and its subsequent requirement that all apply for work was simply part of an unlawful plan to defeat the Unions’ status as the exclusive representative of the unit employees.

Under these circumstances, we find, unlike the situation presented in *Spruce Up*, that the Respondent failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. Moreover, “any uncertainty as to what Respondent would have done absent its unlawful purpose must be resolved against Respondent, since it cannot be permitted to benefit from its unlawful conduct.” *Love’s Barbeque Restaurant*, 245 NLRB 78; 82 (1979). Therefore,

the Respondent was not free to unilaterally set initial terms of employment. Accord: *State Distributing Co.*, 282 NLRB 1048 (1987).

We finally consider the 8(a)(5) allegation relating to the Unions’ information request submitted September 13. As previously noted, the Respondent’s refusal to honor the Unions’ request was premised on the position that the Respondent was not a successor to Fremont Ford, a position that we have rejected for the reasons discussed, supra. Generally, the Unions requested data concerning the identity and status of the unit employees, owners, and officers of the Company, a description of the wages, hours, and other terms and conditions of employment of unit employees, and certain key documents relating to the dealership transfer and takeover by the Respondent. There is no contention that the requested data is irrelevant to the Unions’ functions as the exclusive collective-bargaining representative if this status existed.

It is well established that an employer has an obligation to supply requested information which is reasonably necessary to the exclusive collective-bargaining representative’s responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). The information requested by the Unions as it relates to unit employees is presumptively relevant to collective bargaining. *Harco Laboratories*, 271 NLRB 1397 (1984); *Equitable Life Assurance Society*, 266 NLRB 732 (1983); *Georgetown Holiday Inn*, 235 NLRB 485 (1978); *Leonard B. Hebert Jr. & Co.*, 259 NLRB 881 (1981), *enfd.* 696 F.2d 1120 (5th Cir. 1983); and *Barnard Engineering Co.*, 282 NLRB 617 (1987). The Respondent has not rebutted this presumption. Nor did the Respondent raise issues of relevance or lack of necessity in denying the Unions’ information request. For these reasons, we find that the Unions are entitled to the information requested.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.

We shall order the Respondent to recognize and, on request, to bargain with the Unions as the exclusive representative of all its employees in the unit, including furnishing the information requested by the Unions in their letter of September 13, 1982. We shall also order the Respondent to rescind, on the Union’s request, the unilateral changes in unit employees’ wages, hours, and terms and conditions of employment implemented on May 17, 1982; and to make all affected unit employees whole for

losses they incurred by virtue of its unilateral changes to their wages, fringe benefits, and other terms and conditions of employment in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*.<sup>25</sup> 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), enf. 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 into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1970).<sup>26</sup> We shall also order the Respondent to offer the 22 unit employees, in writing, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights or privileges previously enjoyed, dismissing if necessary persons hired on or after May 17, 1982, and to make them whole for any loss of earnings and benefits in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons*, supra. We shall also order the Respondent to give written notice to the 22 unit employees that it will recognize and bargain with the Unions as the exclusive representative and that it will no longer condition their hire on their willingness to abandon union representation, to cross the Unions' picket lines, and to sign individual employment contracts. We shall also order that the Respondent remove from its records all references to its refusal to employ the 22 unit employees and notify the employees involved that this has been done. We shall also order the Respondent to rescind the individual employment contracts executed on or after May 17, 1982.

<sup>25</sup> 283 NLRB 1173 (1987) Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621 Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977)

<sup>26</sup> Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. It is, therefore, left to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy the "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses.

#### AMENDED CONCLUSIONS OF LAW

1. Delete paragraphs 4, 5, and 6(b) and renumber the remaining paragraphs.

2. Substitute the following for relettered paragraph 4(b).

"(c) Failing and refusing to provide the Unions the information requested on September 13, 1982, which was reasonably necessary to the Unions' responsibilities as exclusive bargaining representative of the Respondent's unit employees."

3. Substitute the following for relettered paragraph 5(e).

"(e) Applying the terms set forth in those contracts rather than the existing terms and conditions of employment to all employees hired on and after May 19."

4. Substitute the following for relettered paragraph 6(b).

"(b) Telling bargaining unit employees that the Respondent's operation after May 17 would be nonunion and that they must be willing to sign individual employment contracts and cross a picket line to keep or get a bargaining unit job and giving them false and misleading information regarding the details of the dealership transfer."

#### ORDER

The National Labor Relations Board orders that the Respondent, Fremont Ford Sales, Inc., d/b/a Fremont Ford, Fremont, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with The East Bay Automotive Council and Its Affiliated Local Unions (the Unions) as the exclusive bargaining representative of the employees in the bargaining unit described below by

(i) Failing and refusing to supply the Unions, on their request, relevant information reasonably necessary for the proper performance of their duties as the exclusive bargaining representative of the employees in the bargaining unit.

(ii) Failing to notify the Unions sufficiently in advance of implementing changes affecting the wages, hours, and other terms and conditions of employment of the bargaining unit employees to permit a reasonable opportunity for good-faith collective bargaining about such changes with the Unions;

(iii) Unilaterally changing wages, hours, and other terms and conditions of employment for bargaining unit employees.

(iv) Bypassing the Unions and dealing directly with bargaining unit employees regarding their wages, hours, and other terms and conditions of

employment by implementing individual employment contracts.

(b) Discriminating against its unit employees by

(i) Refusing to employ them to defeat the Unions' exclusive representative status.

(ii) Conditioning their hire on their willingness to abandon union representation, to cross the Unions' picket lines, and to sign individual employment contracts.

(iii) Any other manner with respect to their hire, tenure, or other terms and conditions of employment in order to discourage support for union representation.

(c) Refusing to employ nonbargaining unit employees and requiring them to apply for work as part of an unlawful plan to defeat the Unions' status as the exclusive representative of the bargaining unit employees.

(d) Telling employees that its previously represented shop and service departments will be non-union and that any employee wishing to work in those departments must sign an individual employment contract and cross the Unions' picket lines as a condition of hire and giving them false and misleading information regarding the details of the dealership transfer.

(e) In any other 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) On request, bargain with the Unions as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time employees employed by [the Respondent], excluding office clerical employees, salesmen, guards and supervisors as defined in the Act.

(b) Furnish to the Unions, on request and in a timely fashion, the information requested by their letter of September 13, 1982.

(c) On request of the Unions, rescind the unilateral changes in the unit employees' wages, hours, and terms and conditions of employment that were implemented on May 17, 1982, and make affected employees whole for losses they incurred by virtue of its unilateral changes to their wages, fringe benefits, and other terms and conditions of employment from May 17, 1982, until it negotiates in good faith with the Unions to agreement or to impasse, in the manner set forth in the remedy section of the Decision.

(d) Offer, in writing, to the extent it has not already done so, immediate and full reinstatement to all 22 employees named below to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, while working for its predecessor, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, discharging if necessary the persons hired into bargaining unit positions on and after May 17, 1982, in the manner set forth in the remedy section of the decision. With the reinstatement offers, the Respondent shall notify the employees that it will recognize and bargain with the Unions as their exclusive representative and that it will no longer condition their hire on their willingness to abandon union representation, to cross the Unions' picket lines, and to sign individual employment contracts.

*Shop and Service  
Department:*

Steve Kirkendall  
Virgil Bilbrey  
Dan Burkhardt  
Darryl (Darrel)

Cooper  
Mel Fosen  
Mohammed Khan  
John Lawson  
David Rabing  
Charles Rudnick  
John Pack  
Marvin Wiggins  
Fred Huffstetler

*Body Shop Department:*

Dan Clark  
William Deetz  
Robert Gonzales

Charles Kiesling  
Manuel Rodilez

*Parts Department:*

David Lawson  
Terry Evans  
Charles Ross

*Combination Departments:*

Robert Hernandez  
Epifano (Beaver) Reyna

(e) Remove from its files any reference to the unlawful refusal to employ the 22 unit employees and notify these employees in writing that this has been done and that this unlawful conduct will not be used against them in any way.

(f) Rescind the individual employment contracts executed on or after May 17, 1982.

(g) 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.

(h) Post at its facility in Fremont, California, copies of the attached notice marked "Appendix."<sup>27</sup> Copies of the notice, on forms provided by

<sup>27</sup> 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 Nation-

the Regional Director for Region 32, 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 taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The Respondent shall also mail copies of the notices to the 22 employees named above.

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

al 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. Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain in good faith with The East Bay Automotive Council and Its Affiliated Local Unions as the exclusive bargaining representative of employees in the bargaining unit described below.

WE WILL NOT fail and refuse to supply the Unions, on their request, relevant information reasonably necessary for the proper performance of their duties as the exclusive bargaining representative of the employees in the bargaining unit.

WE WILL NOT fail to notify the Unions sufficiently in advance of implementing changes affecting the wages, hours, and other terms and conditions of employment of our bargaining unit employees to permit a reasonable opportunity for good-faith collective bargaining about such changes with the Unions.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment for bargaining unit employees.

WE WILL NOT bypass the Unions and deal directly with our bargaining unit employees regarding their wages, hours, and other terms and conditions of employment by implementing individual employment contracts.

WE WILL NOT discriminate against our unit employees by refusing to employ them to defeat the Unions' exclusive representative status; by conditioning their hire on their willingness to abandon union representation, to cross the Unions' picket lines, and to sign individual employment contracts; or by any other manner with respect to our employees' hire, tenure, or other terms and conditions of employment in order to discourage support for union representation.

WE WILL NOT refuse to employ nonbargaining unit employees and then require them to reapply for work as part of an unlawful plan to defeat the Unions' status as the exclusive representative of our bargaining unit employees.

WE WILL NOT tell our employees that our previously represented shop and service departments will be nonunion and that any employee wishing to work in those departments must sign an individual employment contract and cross the Unions' picket lines as a condition of hire and WE WILL NOT give our employees false and misleading information regarding the details of the dealership transfer.

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

WE WILL, on request, bargain with the Unions and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time employees employed by us, excluding office clerical employees, salesmen, guards, and supervisors as defined in the Act.

WE WILL furnish to the Unions, on request and in a timely fashion, the information requested by their letter of September 13, 1982.

WE WILL, on request of the Unions, rescind the unilateral changes in our unit employees' wages, hours, and terms and conditions of employment that were implemented on May 17, 1982, and WE WILL make affected employees whole for losses they incurred by virtue of our unilateral changes to their wages, fringe benefits, and other terms and conditions of employment.

WE WILL offer, in writing, to the extent we have not already done so, immediate and full reinstatement

ment to all 22 employees named below to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed while working for our predecessor. WE WILL also make them whole for any loss of earnings and other benefits resulting from our discrimination against them, discharging if necessary the person hired into bargaining unit positions on or after May 17, 1982. With the reinstatement offers, WE WILL notify the employees that we will recognize and bargain with the Unions as their exclusive representative and that WE WILL no longer condition their hire on their willingness to abandon union representation, to cross the Unions' picket lines, and to sign individual employment contracts.

<i>Shop and Service Department:</i>	<i>Body Shop Department:</i>
Steve Kirkendall	Dan Clark
Virgil Bilbrey	William Deetz
Dan Burkhardt	Robert Gonzales
Darryl (Darrel) Cooper	Charles Kiesling
Mel Fosen	Manuel Rodilez
Mohammed Khan	<i>Parts Department:</i>
John Lawson	David Lawson
David Rabing	Terry Evans
Charles Rudnick	Charles Ross
John Pack	<i>Combination Departments:</i>
Marvin Wiggins	Robert Hernandez
Fred Huffstetler	Epifano (Beaver) Reyna

WE WILL notify each of the above 22 employees that we have removed from our files any reference to our refusal to employ them and that WE WILL NOT use it against him in any way.

WE WILL rescind the individual employment contracts executed on or after May 17, 1982.

FREMONT FORD SALES, INC. D/B/A  
FREMONT FORD

*Kenneth Ko and Charles H. Pernal Jr., Esqs., for the General Counsel.*

*Ralph B. Hoyt, Marcia Hoyt, and Glen Walling, Esqs. (Hoyt & Goforth), of Walnut Creek, California, for the Respondent.*

*Burton F. Boltuch, Esq. (Boltuch & Siegel), of Oakland, California, for the Charging Parties.*

## DECISION

### STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. I heard this case in 7 days of trial proceedings<sup>1</sup> in Oak-

<sup>1</sup> The 1600 page trial transcript contains many errors. The General Counsel has moved to correct the transcript in a large number of particu-

lar, California, between May 3 and 11, 1983. It arose when unfair labor practice charges were filed on September 15, 1982 against Fremont Ford Sales, Inc. d/b/a Fremont Ford (Respondent) by East Bay Automotive Council (Council) and its Affiliated Local Unions (generally the Unions; or by local name and number, e.g., Machinists 1546). On December 7, 1982, after investigating those charges, the Regional Director for Region 32 of the National Labor Relations Board (Board) issued an order consolidating cases, consolidated complaint and notice of hearing.<sup>2</sup>

The complaint alleges in alternative ways that Respondent, a legal successor in the operation of a union-represented auto dealership, committed unfair labor practices by ignoring or refusing to perform certain obligations imposed on it by Section 8(d) of the National Labor Relations Act (Act) to recognize and bargain in good faith with the Unions as the exclusive joint representatives of certain employees of the dealership, thus violating Section 8(a)(5) of the Act; by discriminating for union-hostile reasons in discharging and hiring the dealership's employees, thus violating Section 8(a)(3) of the Act; and by certain statements and acts of agents tending to interfere with, restrain, or coerce employees in the exercise of rights protected by the Act, thus violating Section 8(a)(1) of the Act.

Respondent duly answered, denying all wrongdoing. By refinements of position in the form of amendments, stipulations, and admissions, Respondent has finally put into issue only ultimate questions of its legal liability in a mostly undisputed factual setting.

### Issues

The most important questions are:

1. Did Respondent ever acquire the status of legal successor for collective-bargaining purposes? If not, the complaint is severely crippled; but if so:
  - a. Did Respondent become bound to the labor agreement that bound its predecessor? Alternatively,
  - b. What, if any, changes in employees' wages and working conditions was Respondent free to make unilaterally?
3. Did Respondent unlawfully discriminate—either systematically or in specific cases—in its termination/hiring processes?

lars; Respondent opposes this in only a few cases. I grant the unopposed portions of the motion to correct, but deny it with respect to proposed corrections at Tr 368, L. 16; Tr 374, L. 4; Tr 1049, L. 22, and Tr 1120, L. 7.

<sup>2</sup> The consolidated complaint also originally included allegations against Respondent's predecessor, Fremont Ford, Inc. The allegations against the predecessor derived from charges filed in Case 32-CA-4801 and they were withdrawn on motion of the General Counsel at the outset of the trial, effectively mooted Case 32-CA-4801 and terminating proceedings against that party. I have omitted reference to that case in the caption of this decision and, on the unopposed motion in the General Counsel's posttrial brief, I sever Case 32-CA-4801 from these proceedings and remand that case to the Regional Director for Region 32 for appropriate disposition.

4. Did Respondent's agents make unlawfully coercive statements during interviews and other discussions with employees relating to the terms and conditions under which they might be hired?

On the whole record and with the assistance of excellent posttrial briefs, I make these

#### FINDINGS OF FACT

##### I. INTRODUCTION AND OVERVIEW

At the center of this case are the activities and intentions of Donald M. (Dee) Barnes in a 10-month period during which he managed and eventually became the full owner of a car and pickup truck dealership in Fremont, California, a city located in the continuous urban belt on the east side of San Francisco Bay. The dealership has been commonly known as Fremont Ford during all times that concern us.<sup>3</sup>

Everyone agrees that Barnes had fully acquired ownership and control of Fremont Ford by no later than May 17, 1982,<sup>4</sup> doing so with the backing of Ford Motor Company (Ford) through a "Dealer Development Program," essentially a financing arrangement which is described more fully within. But the General Counsel and Charging Party jointly maintain<sup>5</sup> that the effective takeover and successorship by Barnes really took place much earlier, perhaps in 1981, but definitely by March 19, 1982. The General Counsel also points to certain documents and to the conduct and admissions of Respondent's agents assertedly showing that even the parties to the sale deemed the takeover to be effective by no later than May 7, 1982.

Respondent argues that Barnes did not take title to the assets of Fremont Ford until May 17, and did not begin running Fremont Ford for his own "benefit" until it reopened on May 19. At this point, Respondent says, its status as a labor relations successor was still in doubt; a doubt that was not resolved until an asserted "full complement" was eventually hired more than 4 months later, which proved to contain less than a majority from the pre-May 17 complement.

The General Counsel also contends that Respondent owed—and violated—a duty to bargain with the Unions even if legal succession did not happen until May 17 (or 19), 1982. But the questions whether Respondent, through Barnes, took over effective control of the dealership at some point before that date and, if so, when this occurred, will have significance to remaining issues and to Respondent's potential remedial liability, and they

<sup>3</sup> This includes periods when Fremont Ford, Inc., the owner of the predecessor operation, also sold and serviced Fiats and Lancias, apparently a sideline to its Ford business. It was then doing business alternately as Fremont Ford or Fremont Fiat-Lancia.

<sup>4</sup> Respondent amended its answer at trial to admit that its projected gross income would exceed \$500,000 in the 12-month period ending on May 17, 1983, and that it would purchase and receive directly from outside California during that period goods worth more than \$5000. Respondent also admitted the conclusion that it is and has been at material times an "employer engaged in commerce" within the jurisdictional reach of the Act.

<sup>5</sup> References below to the General Counsel's position shall refer as well to that taken by the Charging Party, there appearing to be harmony between them on all factual and legal questions.

were more closely litigated and briefed than any other matters.

These questions necessarily require attention to the details attending Barnes' managership and eventual ownership of Fremont Ford's assets. A close review of the extensive documentary and testimonial evidence on these points persuades me that the facts are not so much in dispute as are questions of their proper characterization and legal import. Indeed, my findings below relating to the management and eventual sale of the dealership derive, except where noted, from records and from credible portions of the testimony of Barnes and other agents of Respondent<sup>6</sup> and that of the former principals in the dealership. To avoid extensive factual recapitulations in the eventual analysis, I join my findings with some running observations and interpretations relevant to my ultimate disposition of the main issues.

Before Barnes came on the scene and until May 17, 1982, the Unions were recognized as the joint bargaining representatives of Fremont Ford's nonsupervisory service mechanics (or technicians), service writers, parts department and body shop employees, and related helpers and utility people.<sup>7</sup> Those employees had been thus represented since before 1978, when the dealership was acquired by Respondent's corporate predecessor, Fremont Ford, Inc. (FFI).

On takeover, FFI adopted and applied the labor agreement that then bound the Unions and the employer-members of United Employers, a multiemployer bargaining agency which FFI formally joined in August 1980. A more recent multiemployer contract, effective August 20, 1980, through August 20, 1983, was admittedly applied to unit employees at Fremont Ford through May 17, 1982.

Since the point of its admitted takeover, Respondent has admittedly refused to recognize or bargain with the Unions or to apply the labor agreement, concededly making many unilateral changes after that date in the wages, hours, and other terms and conditions of employment of employees in the bargaining unit.

#### *A. Barnes Arrives at Fremont Ford, Advertises Himself as its "New Owners" and Begins to Make Changes*

In July 1981 Barnes accepted the invitations of Fremont Ford's then principal owners, Paul Brinkman and Leon Pettitt, to buy a 20-percent share of FFI, to become its corporate president, and to take over as the general manager of the dealership. These arrangements had followed a series of efforts by Brinkman and Pettitt

<sup>6</sup> Respondent has stipulated that certain persons with managerial or supervisory titles referred to below were, after May 17, 1982, its supervisors within the meaning of Sec. 2(11) of the Act and its agents. The record incidentally contains ample evidence to support the conclusion that those persons were also statutory supervisors throughout their employment at Fremont Ford during all periods described below in LABOR RELATIONS HISTORY.

<sup>7</sup> These terms are merely descriptive of the unit generally. The precise scope of the historical unit requires attention to certain general recognition language in the multiemployer-multunion labor agreement referred to below, as well as to the practices among the parties to that relationship.

in the preceding months to rid themselves of Fremont Ford, which they viewed as an unprofitable investment; indeed, they saw it as a significant cash drain.

Brinkman-Pettitt had tried first to sell the dealership to Joseph Tigue, then the general manager and a 20-percent shareholder in FFI; but while Tigue was still trying to put together a financing plan, a better buyout offer was made by another party, Valente. The Tigue deal was then put aside and Valente's proposal was pursued. That plan did not work out, however, when Ford headquarters in Detroit (Ford-Detroit) balked at transferring the franchise, acting out of dissatisfaction with Valente's arrangements for the general managership. In the meantime Tigue had lost interest, leaving Brinkman-Pettitt where they had started, in search of a buyer.

Brinkman saw the dealership as "terminal" by that time. Barnes was approached in late June 1981 in part because both Brinkman and Pettitt believed that he was an able manager. Barnes had previously worked for Brinkman as general manager in one of Brinkman's other Ford dealerships. Both Pettitt and Brinkman owned other Ford and Lincoln-Mercury dealerships in the greater San Francisco Bay area and, since 1981 at least, their principal day-to-day attentions had been directed to these other operations.

Brinkman also acknowledged, without conceding that this affected their decision to seek out Barnes, that he and Pettitt knew from their prior associations that Barnes had been interested for some time in becoming the owner-operator of a dealership. Barnes admittedly knew at the time of his arrival at Fremont Ford that Brinkman-Pettitt had been trying to sell the business.

The parties disagree whether there was an understanding from the start between Barnes and Brinkman-Pettitt that Barnes would eventually buy Fremont Ford. I find from the history just summarized, and from the fact that Barnes was a good candidate for Ford-Detroit approval under its Dealer Development Program,<sup>8</sup> that the July 1981 association of the three men was influenced by the prospect that Barnes would eventually buy out the business. Various denials by them that anything was said aloud among them about this were somewhat beside the point. All three men testified in a generally guarded way in any case, and their denials on this matter struck me as having been tailored to suit Respondent's litigation posture and as inconsistent with the probabilities.<sup>9</sup>

<sup>8</sup> Barnes said unqualifiedly in a pretrial affidavit that he had been approved in 1978 by Ford-Detroit as a potential Dealer Development Program operator in a deal that was never consummated. He hedged on the point during his trial testimony, but acknowledged that he believed in 1981 that he had a "good opportunity" to be approved as a Dealer Development Program operator at Fremont Ford.

<sup>9</sup> Respondent cites testimony by Brinkman that he had sought a \$450,000 bank loan in the period August-September 1981 to provide necessary additional capitalization to the dealership as evidence that Brinkman-Pettitt had not planned initially for Barnes to buy out the business. I do not find such testimony, if true, to be necessarily supportive of Respondent's conclusion, and Brinkman's testimony on the point is confusing. Thus, Brinkman conceded that he actually obtained a loan commitment for the \$450,000 amount but turned it down, claiming that he by then believed even more working capital was required and that the bank would lend no more than \$450,000.

Setting aside the question of specific intentions in July 1981, when Barnes became a shareholder and president of FFI and took over the general management of Fremont Ford, it is at least clear that Barnes personally appeared in a series of Bay area television commercials in the period around September 1981 calling himself the "new owner" of Fremont Ford. Barnes explained that this was done to promote the business through an advertising campaign centered on the slogan "New dealer, new deal." It is therefore clear that Barnes then believed it would be helpful to portray himself to the public as having succeeded to the ownership of Fremont Ford. By contrast, Barnes admittedly did not conduct any "new owner" advertising campaign after May 19, 1982, when, Respondent now insists, the business officially reopened under "new ownership."

It is equally clear that before the end of 1981 Barnes had already begun to effect significant operational and management changes. These included reductions in the numbers of mechanics and bodyshop workers and the installation of a new service manager, Robert Radcliffe, a new bodyshop manager, Robert Bold, and a new general sales manager, Kenneth Barnes (Barnes' brother who was later replaced, ultimately by Pat Doyle).<sup>10</sup>

There is summary testimony by Barnes that he consulted in some manner with Pettitt about some or all of these choices. But Pettitt's description of his own role in these hirings shows that Pettitt relied entirely on Barnes' judgment (e.g., Pettitt's admitted response to Barnes' recommendation of Doyle: "Go ahead, if you think the guy's right. Do it").

By December, Barnes had decided to implement a physical and supervisory reorganization of the parts and service departments under the overall supervision of a "parts and service director" (or "coordinator")—a position that had not previously existed in the managerial hierarchy. To fill this new job, Barnes recruited and hired Larry Smith, a former associate at a Monterey dealership that Barnes had managed. To get Smith to accept the job, Barnes first flew to Idaho, where Smith was by then living, and agreed to pay approximately \$2500 to cover Smith's moving expenses back to California. Barnes' Idaho trip and Smith's moving costs were paid for by FFI funds and, if these arrangements were "approved" at all, it was done after-the-fact, under unclear circumstances.<sup>11</sup>

After Smith's arrival in January, there were further managerial shifts implemented by Barnes (or by Smith, with Barnes' approval). Ken Collins was hired to run the bodyshop, replacing Bold. Collins was, in turn, discharged and Charles Edmonds was hired in his place in late April, following a hiatus during which Barnes thought about whether to continue a bodyshop oper-

<sup>10</sup> Dee Barnes admittedly decided to replace the incumbent general sales manager when he took over management in July 1981, bringing Kenneth Barnes with him to take the sales job. Kenneth, in turn, resigned 2 months later and Dee again selected another individual, Dick Estes, for that position. Estes, in turn, quit after 1 month and Barnes finally located Pat Doyle for the position in September or October 1981.

<sup>11</sup> Brinkman was the only witness who testified that there was some unspecified "approval" process in Barnes' recruitment of Smith. Barnes and Pettitt seem to contradict this in their testimony.

ation. Robert Alderson had also been hired by then to replace the used-car sales manager. The parts manager was fired in April and was replaced by Lyle Fleming, another of Barnes' former associates from the period when Barnes had managed the Monterey dealership.

All of these supervisory people were retained when Barnes admittedly became the "full" owner in May 1982. Thus, I find that Barnes had already assembled and installed his own management team in advance of the date of his acquisition of the dealership's assets.

The changes instituted by Barnes during the July 1981-May 1982 period may have been nominally subject to Brinkman's and Pettitt's approval, but the record suggests that such approval was readily forthcoming if it was sought. As noted above, Barnes did not always seek advance approval. With respect to the "new dealer-new deal" advertisements in September, for example, there is no dispute that Barnes did this without prior consultation with Brinkman-Pettitt (although they learned about and did not disavow those actions). The same is true of Barnes' reorganization of the storage system and general layout of the parts department.

It is not disputed that in his role as general manager of Fremont Ford, Barnes was in effective day-to-day control of the dealership from the outset, exercising at least the same degree of authority that Tigue, his predecessor in that position, had exercised, including over labor relations matters.<sup>12</sup> Respondent would insist, however, that there were "limits" placed on Barnes in his pre-May 17, 1982 management of Fremont Ford. The testimony of Brinkman and Pettitt contains many such general statements, but few specific examples. These were the matters of advertising budgets during certain periods and the alleged requirement that Barnes "consult" before spending above-existing levels for "nonproductive" personnel—a term used by Pettitt to refer to persons who create "overhead" costs (supervisors, for example) but do not directly draw customer dollars by their labor (as do, for example, mechanics).

The specific matters just noted may arguably be described as "limits" that Brinkman-Pettitt placed on Barnes, but on this record they must be seen as a function of the badly undercapitalized state of the business at the time, a state of affairs admittedly linked to the "limits" which Brinkman-Pettitt placed on themselves in their regular financial contributions to keep the operation going. As such, these limits did not reflect reservation of operational authority to Brinkman-Pettitt, nor second-guessing by them of Barnes' operational decisions; they amounted simply to investment limits. Moreover, the unilateral creation by Barnes of a wholly new supermanagerial position for Smith, and the related measures and expenditures associated with Smith's taking that job, tend to undermine Pettitt's claim that he placed any real limits on Barnes' authority to spend for "nonproductive" per-

<sup>12</sup> Brinkman admitted, incidentally, that Tigue had formally enrolled FFI in United Employers in 1980, signing as vice president and general manager, and had done so without Brinkman's prior knowledge. Pettitt expressly acknowledged that Barnes had "responsibility" for labor relations matters affecting the "hourly" employees

sonnel.<sup>13</sup> In any case, Pettitt said that Barnes was free to augment or shrink the numbers of persons in "productive" classifications (including virtually all nonsupervisory employees) as he saw fit. Thus, the generalized "limits" on Barnes' authority were not shown to be more than vague understandings, never memorialized in writing, and applied, if at all, in an "informal" process (Brinkman's term) of review by Brinkman or Pettitt (mostly Pettitt) of monthly spending projections and periodic accountings. Finally, while there had been a written management agreement between FFI and Tigue as general manager, there was no such agreement with Barnes, after he took over from Tigue as general manager.

It clearly seems that the process of "approval" by Brinkman and Pettitt of Barnes' management was, at best, routine and perfunctory. Indeed, the specific instances in this record appear to have involved after-the-fact approval, if at all. I therefore find that Barnes was, immediately on his arrival at Fremont Ford, the effective day-to-day operator<sup>14</sup> of the business in all its normal activities; and, although he may have engaged in some occasional consultations with Brinkman-Pettitt, the restraints that this process imposed on his overall control were more theoretical than actual. This is most clearly revealed by the fact that he felt free to identify himself publicly as the "new owner" and by the fact that he was allowed to run the business as he thought best, including by resort to such "out of the ordinary" expenditures (Brinkman's expression) and arrangements as those required to recruit and relocate the new parts and service director, Larry Smith, and by other measures detailed above and elsewhere within.

#### *B. January 1982: Formal Agreement is Reached to Sell Fremont Ford to Barnes Under Dealer Development Program*

By early January 1982, coinciding roughly with Larry Smith's arrival and assumption of his new position within the dealership, Barnes and Brinkman-Pettitt admittedly reached agreement that Barnes would buy out the dealership. The mutual plan was for Barnes to get financial backing under Ford's Dealer Development Program (DD Program).

<sup>13</sup> Pettitt unconvincingly sought to rationalize Barnes' pre-"consultation" creation of an additional managerial position for Smith as not having truly created additional "overhead" costs, claiming that this would simply free the department managers to do "productive" work, without any net increase in operating expense. There was no showing, however, that those managers did, in fact, begin to perform "productive" (i.e., bargaining unit) work after Smith's arrival, and there seem to have been obstacles to such a practice while the labor agreement was in effect (see, e.g., art. II, sec. 5, and art. XVI, sec. 5 seeming to place limits on, or prohibiting, such practices, with special provision for the writing of service orders)

<sup>14</sup> The term "operator" may be one of art within the auto sales industry, if so, a precise definition cannot be obtained from this record. I infer from the context within which it was used by Respondent's managerial witnesses and from the Ford-generated documents received into evidence, that it refers to the person actually in charge of day-to-day operations in a dealership, as distinct from its equity owners. It was in this context that Pettitt, for example, had no difficulty in saying that Barnes, like Tigue before him, was the "operator" of Fremont Ford.

Functionally, Ford's DD Program is a system designed to aid would-be owner-operators otherwise acceptable to Ford as franchisees but who are without independent resources to buy and provide necessary working capital for a dealership. It is, essentially, a financing plan. The system contemplates the setting up by Ford of a "Dealer Development Corporation" (DD Corp.) into which Ford will infuse an 80-percent share of the funding necessary to buy and capitalize the dealership, using standard Ford criteria for determining capitalization minimums. The prospective operator will contribute the 20-percent balance to the DD Corp. and will become its president. In the lexicon of the DD Program, the "president-operator" is also termed a "partial equity owner" in the DD Corp.<sup>15</sup>

The system does not contemplate long-term involvement by Ford in a DD Corp. It is part of the program that the president-operator must apply all of his stock dividends and a minimum of 50 percent of his annual operator's bonus towards an eventual buyout of Ford's interest. For this reason, while mindful of the corporate arrangement, I have deemed it reasonable both for short-hand purposes and as a matter of substantive fact to refer above and below to the eventual sale of Fremont Ford as being, essentially, a sale to Barnes.

Procedurally, following preliminary approval by Ford-Detroit of the application filed by the prospective operator, a DD Program specialist from Ford-Detroit (an investment representative) takes over and directs the course of things thereafter. He first prepares scores of forms and documents that must be completed and executed before Ford-Detroit will authorize the creation and 80-percent funding of the new DD Corp. These include necessary corporate authorizations for the selling corporation to grant "options" to the Ford representative to buy the business and to sublease the premises (assuming, as here, a leasehold), as well as a buy-sell agreement and a sublease instrument setting forth the substantive arrangements between buyer and seller if and when the options are exercised.<sup>16</sup>

Having made these preparations, Ford's investment representative will travel to the dealership and will conduct there a detailed inventory and valuation of the various properties to be acquired. He will then arrange for completion and signing of the voluminous paperwork necessary to be in place for a quick conclusion of the transaction once it receives final authorization from Ford-Detroit.<sup>17</sup>

<sup>15</sup> Ford's security is ensured by its ownership of all preferred and voting stock (the partial equity owner having only common stock) and by its right to designate a majority of the directors (two of three in this case) who are normally management agents of Ford-Detroit and of a Ford regional office.

<sup>16</sup> Since formal "exercise" of these options does not take place until final closing, and since the substantive buy-sell agreement contains detailed provision for operation of the dealership in the period before closing (including for advance "takeover" by the buyer, as set forth below), the buy-sell agreement, while in some senses a "contingent" one, must also be seen as having independent vitality on the grant of the option itself. So long as this is kept in mind it is harmless to indulge for description's sake the fiction that the substantive buy-sell agreement does not "take effect" until "exercise" of the buy-sell option.

<sup>17</sup> It may be that it is not always as mechanically routine as the foregoing summary might suggest, but the record indicates that the process

On final authorization from Ford-Detroit, the investment representative will order the filing of instruments of incorporation in Delaware and the filing of bulk sales notices and other qualifying papers in the State and locality of the dealership. He will also prepare in advance a large new package of formal corporate papers for the DD Corp., including waivers of notice of meeting and canned "minutes" in which directors are named and various resolutions are passed authorizing or (in many cases) ratifying all the minutiae of activity legally associated with the sale of an ongoing auto dealership by a corporation to a corporation.

### *C. January-May 1982: Steps to Conclusion of the Sale*

#### 1. Introduction

The bulky exhibit files in this case contain the detailed trail of formal, written dealings leading to what Respondent believes were the critical closing transactions between the DD Corp. and Brinkman-Pettitt on May 17, 1982. That paper trail does not always conform to the precise sequence of events found to have occurred; neither does it normally matter to record or discuss the discrepancy. It is also best to read these documents with the recognition that the transaction involved desperate, "absentee" sellers<sup>18</sup> and a buyer-in-place. And that same set of circumstances requires the preliminary caution that the paper trail does not always accurately reflect the realities of the underlying relationship between Barnes and Brinkman-Pettitt, nor the realities of actual control of the dealership.

I summarize below what seems to me to be the transitional highlights between early January, when the admitted deal was made to sell Fremont Ford to Barnes through a DD Program, and May 17, when money changed hands and the corporate "minutes" reflect that the deal was corporately authorized and consummated.

was virtually this routine in this case (the only exception being evidence that there were some substantive discussions about the duration of fixed rental fees for the sublease). Also, nothing in the testimony of D M Coleman (Ford's investment representative) about his 25 years of experience in "buying and selling dealerships" disturbs the impression that the process, while requiring professional energy, judgment, sophistication, and attention to detail, is one that Ford has gotten down to something of a routine. When, as here, the sellers are desperate (see fn. 18), Ford appears to be in a position at least to draw the overall form, if not to define the substance, of the transaction.

<sup>18</sup> In addition to findings above that Brinkman viewed Fremont Ford's condition as "terminal" as early as June-July 1981, I note here that there was a devastating yearend accounting report weighing on Brinkman-Pettitt. When the proposal was made in January 1982 to sell to Barnes through the DD Program, Pettitt admittedly responded, "Let's get out, the quicker the better, now." When money changed hands on May 17, Pettitt viewed this as "the end of the hemorrhage." See also findings below about Brinkman-Pettitt's agreement by early January 1982 to value Barnes' share in this "terminal" business at \$160,000 even though he had paid only \$132,500 for that share when he had bought into FFI 6 months earlier.

2. January to March 19: Preparation and preliminary approval of a DD Program package for Fremont Ford

By no later than January 11, Barnes and Brinkman-Pettitt had reached an agreement to buy Barnes' share in FFI for \$160,000—an increase of roughly 21 percent over its cost to Barnes 6 months earlier. This is reflected in Barnes' application for materials for the DD Program that he completed on January 11 and then submitted to Ford's San Jose district sales office, the first stop on the application's progress toward eventual Ford-Detroit approval. Brinkman separately acknowledged the valuation of "approximately \$160,000" in a letter to the same Ford district office the same day in which he "confirm[ed] previous conversations" with that office "regarding the intentions of Leon Pettitt and myself to divest our interests in [Fremont Ford]."

The principals substantially concede—and I find—that the \$160,000 valuation was not so much influenced by some judgment about the market value of Barnes' share in this "terminal" business as it was by the fact—recognized by all parties—that this was the amount that Barnes would need under Ford's capitalization requirements for his 20-percent initial participation in the prospective DD Corp.<sup>19</sup> Respondent says as much on brief, observing that "it was worth that additional sum to be out from under the financial burden."

By February 10, Barnes' application had been processed regionally and was being forwarded to Ford-Detroit by L. E. Otto of Ford's "San Francisco Dealer Development Branch." Otto summarized the financial condition and sales prospects of the dealership in a covering memorandum of that date and Otto categorically "recommend[ed] this investment in Fremont, California, with Mr. Dee Barnes as the operator," confirming, incidentally, that "Mr. Dee Barnes' investment funds of \$160,000 will come from the purchase of his interest in Fremont Ford by Messrs. Brinkman and Pettitt." Otto also summarized certain understandings that had been reached between Brinkman-Pettitt and Barnes regarding some transitional details and stated that "a monthly salary . . . has been agreed upon with Mr. Dee Barnes."<sup>20</sup> Otto also recommended, "To maintain continuity of operation and management, a name as close as possible to Fremont Ford is proposed, i.e., Fremont Ford Sales or Fremont Ford Motors, Inc."

After receipt by Ford-Detroit of Barnes' application and Otto's forwarding recommendations, the file received review and "tentative approval" by the required officials. These included D. M. Coleman, the Ford-Detroit investment representative who would take care of all matters after that and who, along with Otto, would be Ford's other designee on the board of the new DD Corp. Coleman then prepared the numerous documents and other forms and paperwork needed to be signed,

<sup>19</sup> The necessary capitalization amounts may have been derivable from published Ford criteria. In any case, Barnes admitted that the amounts involved here had been specifically established by Ford for the Fremont dealership when Tigue had explored buyout possibilities in 1981.

<sup>20</sup> Presumably, Otto, who would become a director in the DD Corp when it was formed, was the party who "agreed" with Barnes on the salary Barnes would receive under the proposed DD Corp

completed, or filed by Brinkman-Pettitt and Barnes before Ford-Detroit would authorize the final step, the creation and funding of the DD Corp.

According to prearrangement, Coleman traveled to Fremont and spent the business week of March 15 in meetings with Barnes, Brinkman-Pettitt, and others, obtaining the necessary signatures on all the paperwork and conducting the extensive preliminary inventory and valuation of assets then on hand which would be subject to the prospective sale.<sup>21</sup> The paperwork details accomplished that week included the following:

1. Barnes' signature on a prepared document of resignation from his presidency and other corporate positions in FFI; this admittedly done at the beginning of the week to avoid the appearance of self-dealing between FFI and Barnes in the formal transactions that ensued.

2. The execution by FFI's newly constituted directors of a resolution authorizing the corporate purchase of Barnes' share in FFI for \$160,000.

3. The execution by FFI's officers of resolutions authorizing the corporation to grant a buy-sell option to Coleman and the execution by Brinkman-Pettitt in their individual capacities of a sublease option and a sublease itself (the leasehold apparently being in their own names).

4. The submission by Brinkman for FFI of a formal "resignation" from the "Ford Sales and Service Agreement" (the essential franchise agreement with Ford) and from other, similar agreements with Ford, all conditioned on Ford's grant of the same to the prospective DD Corp.

The buy-sell agreement, attached to the buy-sell option and incorporated by reference therein, is itself a 25-page basic document containing essentially all terms and rights and obligations of the parties throughout the ensuing period until closing. It contains, inter alia, provisions for the taking of final inventories, formulas for the liquidation of a net purchase price, and a provision for the creation of a bill of sale as of the "Closing Date." This, incidentally, is a term of art to be distinguished from the "Takeover Date," which is contemplated by the agreement to occur *before* the "Closing Date." By its terms (emphasis added):

SELLER . . . requests that BUYER *take possession* of the operating assets and premises *on a date specified by BUYER (Takeover Date) approximately five (5) days before Closing Date* to assist SELLER in the taking of inventories and preparation of schedules contemplated by this Agreement and *to conduct the business until the Closing Date* to the same extent *as though the transactions . . . had been consummated effective with the Takeover Date. In operating the business from the Takeover Date to the Closing Date, all profits and/or losses incurred shall accrue to the BUYER.*

<sup>21</sup> This did not include the inventory of Fiat and Lancia products and parts (see fn 3), which was physically segregated and eventually removed from the premises.

The buy-sell and sublease options each ran to Coleman, but the DD Corp. was the acquiring party named in the attached buy-sell agreement as BUYER and was the sublessee named as TENANT in the sublease attached to the sublease option. Barnes was identified as the subscribing and initialing party, respectively, on those basic instruments, in his capacity as president of the DD Corp., which by then had been christened "Fremont Ford Sales, Inc." (FFSI), the Respondent. Also signing for FFSI on the sublease instrument was Frances Baker, as secretary-treasurer. Baker was then the office business manager at Fremont Ford and was Barnes' personal selection for the corporate position in FFSI. She would continue after May 17 also to function as the office business manager for the dealership.

I will return in my analysis to the significance of Barnes' formal stepover from president of FFI to president of FFSI in mid-March and of the formal provisions which seemingly bound him to take over and become responsible for the business before closing was perfected (and to treat the closing, *nunc pro tunc*, as having occurred simultaneous with the takeover). For now, I believe it fair simply to observe in summary that these formal dealings alone dictate a finding that Barnes was no longer being treated as a representative of FFI, but rather, was regarded as the authorized corporate agent of FFSI, the entity which it was contemplated, would take formal possession and control of the assets and operations of the dealership at some point before closing. Since it was also contemplated that FFSI would have the right to "specif[y]" the takeover date, and since FFSI (through Coleman's holding of the 80-percent funding) held the key to the timing of closing, this left very little discretion in the hands of FFI, the nominal owner, to control the timing and substance of key events at the dealership thereafter.

It may also be observed that while Brinkman-Pettitt, through FFI, retained some formal right to control the business after March 19, they were bound by many restraints set forth in the buy-sell agreement, *inter alia*, to "cause [the] dealership to function in the ordinary course . . . of business and in a good and efficient manner" and to "afford BUYER . . . at all reasonable times, access and facilities to use with respect to all properties of SELLER . . . books, files, records . . . for the purpose of audit, inspection and examination thereof" and to keep current properties free of "lien or other encumbrance" and not to "acquire or dispose . . . or in anywise obligate itself to do so" with respect to its current property.

There were thus numerous formal steps taken by which, as of the March 19 option grants, FFSI had already secured rights of supervision and control of the dealership. Since FFSI existed only in contemplation at that time, and since Barnes was its official representative and was in place as general manager, it is also fair to observe that FFSI, through Barnes, was already in the driver's seat for many important purposes as of March 19.

Although Respondent maintains that Barnes was still acting for FFI's "benefit" at that time and until May 17 in his capacity as general manager, there are many indications in findings above and below that Barnes and

other FFI personnel and processes were used in ways more directly traceable to FFSI's interests. That aside, it is worth pausing to consider who would win as between Barnes and Brinkman-Pettitt in a contest of wills over the management of the business in the period between March 19 and closing. Clearly, with FFSI having broad rights of access and review, and exclusive control over the timing of takeover and closing, and with FFSI's recognized president, Barnes, already in place as the general manager, it was Barnes who held practical power. For to dispute with him over managerial matters was to risk at least a delay in concluding the deal that Brinkman-Pettitt yearned to close.

Ford's representative Coleman acknowledged that by March 19, with the signing of the necessary papers behind them, there were no apparent obstacles to the conclusion of the sale, even though he still needed to obtain authorization from various officials within the Ford-Detroit hierarchy. Thus, listing typical potential obstacles, Coleman acknowledged that with Barnes in place there would be no problems with last-minute "inventory-switches" by the seller, nor with Ford-Detroit approval of Barnes personally as the operator, nor would there be problems with Barnes' obtaining his share of the financing for the DD Corp. in the light of FFI's commitment, formally executed by March 19, to buy Barnes' share in FFI for the required \$160,000. From there, the consummating details did fall into place, as I find next.

### 3. March 19–May 17: The package gets final approval and money changes hands

On his return to Detroit, Coleman prepared a "request" for authorization to create and fund the proposed DD Corp. By March 25, this was being routed through the required layers of Ford-Detroit management. It received what Coleman called "final approval" on April 22. Coleman called Barnes and Brinkman-Pettitt with the news on the same day.

There are strong indications that Coleman knew before April 22 that the investment would be approved. A 10-page certificate of FFSI's incorporation was filed in Delaware on April 23, on Coleman's telephoned authorization to go forward with the filing. Other corporate resolutions and bylaws were also ready for signing on that date. It is doubtful that so much paperwork would have been prepared in time for an April 23 filing if there had not been some prior assurance that authorization to create the DD Corp. would be forthcoming. The same is true regarding the signing by local counsel on April 23 of local notices of an intended bulk sale. Similarly, Coleman had made advance contact with a local firm, Pacific Coast Inventory Co. By letter of April 23, Coleman "confirm[ed]" that Pacific was to conclude an inventory no later than May 19 and that it would begin conducting the inventory in the "preceding week." Coleman also stated in the April 23 letter that Barnes should be contacted before the inventory process began. As Coleman explained from the witness stand, Barnes would act as FFSI's agent in supervising the process.

L. E. Otto, who would become an officer and director in the DD Corp., also clearly anticipated that Ford-De-

troit would give final approval for its creation and funding. On April 16, Otto wrote to Barnes as "President and General Manager" of FFSI to discuss certain financing matters for which Barnes was already deemed responsible. The conclusion is therefore warranted, despite Respondent's contrary contention, that even before Ford-Detroit gave its final approval the key actors believed that nothing but formalities remained to be accomplished before the DD Corp. would be created and funded and title to Fremont Ford's assets would pass to the new corporate owner. Indeed, those actors had begun to behave as if the DD Corp., with Barnes as its president, was already a viable entity.

Any contention that Barnes viewed himself as merely the steward for FFI in operating the business between April 22 and May 17 is undermined by the actions of Barnes and those of his subordinates and other agents of FFSI. In late April and early May, Frances Baker began making application for various licenses and tax numbers in FFSI's name, arranging for the substitution of FFSI for FFI on telephone service and other billing accounts, researching insurance programs, and doing similar preparatory work. Her filings reflect some inconsistency as to the date on which FFSI would "officially" begin operating Fremont Ford—a sign that the precise date had little real meaning. Baker also opened a checking account in FFSI's name at some undisclosed point before May 5, the checks already having been printed and the first deposit having been made by that date. All of these activities, although clearly done for FFSI, were done at Barnes' instruction, while Baker was still on FFI's payroll.

On April 27, Brinkman, on behalf of FFI, tendered a written "resignation"—this one being unconditional—from the Ford Sales and Service and related agreements between Ford and FFI. The resignation, by its terms, was to be effective upon its acceptance by Ford.

On May 7, Ford-Detroit wrote to Brinkman, stating that the resignations had "become effective." That same day, Barnes, acting for FFSI, and Ford entered into new Sales and Service franchise and related agreements. Also that same day, Coleman drafted a check payable to FFSI for \$640,000 representing Ford's 80-percent funding of the new DD Corp. By this time, Coleman had already authorized the filing of necessary instruments for FFSI to qualify to do business in California and FFSI was, in fact, so qualified, effective May 5.

On May 17, a Monday, Coleman appeared in Fremont bearing the 80-percent funding check for the DD Corp. The principals in the sale met that day to sign off on the necessary prepared "minutes" and other documents and to exchange moneys. That same day Smith and service and parts supervisors conducted employment interviews with current bargaining unit employees as described, *infra*.

On May 18, the dealership was closed to the public (or, at least, the shop and service operation was closed). "Outside" applicants were interviewed that day for bargaining unit positions.

On May 19, Fremont Ford reopened for business with a reduced unit employee complement, as described fur-

ther below, but one that was composed exclusively of former unit employees.

#### 4. Miscellaneous findings and comments on the question when the takeover occurred

I have noted provisions in the buy-sell agreement that allow the conclusion that FFI and FFSI themselves intended that formal "takeover" of the dealership by the latter would occur before closing (the written instrument indicating that takeover would occur "approximately" 5 days before the closing). I have noted that the actual substitution of FFSI for FFI as the signatory to the necessary franchise agreements and licenses from Ford occurred on May 7 and that FFSI was by then officially qualified to do business in California. This combination of facts invites the conclusion that the parties themselves intended to make FFSI legally responsible for the operation of the dealership by May 7.<sup>22</sup> Thus from a practical standpoint, considering Barnes' actual control, and seemingly from a contractual standpoint as well, it was FFSI that was in place and operating the business by no later than May 7.

Although the foregoing considerations persuade me that both buyers and sellers had begun to treat the takeover as having been accomplished at least by May 7, it is true that some expenses, rental amounts, and certain taxes were pro-rated at closing using May 17 as the cutoff date. Such arrangements, however, do not directly answer the question who was in operational control of the dealership before May 17. At best, they are indirectly probative on that point and are not as weighty as those indications set forth next that also point to the conclusion that the parties to the transaction viewed FFSI's takeover as an accomplished fact well before May 17.

A letter from Brinkman to the Unions dated April 20 makes it reasonably clear that FFI's principals viewed the transaction as having been effectively completed by that date. Thus, Brinkman, writing as FFI's president, told the Unions (emphasis added):

Certain assets of Fremont Ford, Inc. *have been sold* to Fremont Ford Sales, Inc. Our ownership . . . terminates as of the close of business on or about *May 1, 1982*. When the buy-sell agreement is totally consummated, you will be notified of the exact date.

I note, incidentally, that this is further indication that the parties were confident that Ford-Detroit would give final authorization for the creation of the DD Corp., for Brinkman's letter was written 2 days before Coleman says that such authorization was given.

<sup>22</sup> I recognize, but discount, Coleman's comment while testifying that there was still some process of "approval" of the franchise transfer by Ford-Detroit that had to take place after the May 7 date when FFSI became signatory to the franchise and related agreements with Ford. Coleman was particularly unconvincing when he said this and it is difficult to understand how it could be that the ongoing dealership could operate after May 7 without *someone* being licensed or franchised to sell Ford products. Since FFI's right to do so was admittedly extinguished as of May 7 when Ford-Detroit accepted its resignation, I conclude that Coleman's vague testimony about some necessary further "approval" process by Ford-Detroit with respect to FFSI's franchise was, essentially, an improvisational fiction.

Although the reasons for it are not well explained, Brinkman amended his April 20 announcement in another letter to the Unions dated May 3. There, Brinkman said (emphasis added):

Certain assets of Fremont Ford, Inc. . . . have been sold to Fremont Ford Sales, Inc.

*Our ownership . . . terminates as of the close of business on or about May 17 . . . and our collective bargaining relationship with you will cease as of that date.*

When the buy-sell agreement is totally consummated, you will be notified of the exact date.

Here, there is the suggestion that the parties to the sale intended for *collective-bargaining purposes* to treat the date of closing as the critical takeover date, despite the evidence already discussed that for other purposes the substantive takeover was intended to occur earlier.

To make matters necessarily more confusing to the employees and to their collective representative, Brinkman wrote another letter the next day, May 4, this one directly to employees in the unit. There, Brinkman stated (emphasis added):

Certain assets of Fremont Ford, Inc. . . . have been sold to Fremont Ford Sales, Inc., a new corporation.

It is anticipated that the existing Ford Sales Agreement . . . will terminate during the week of May 17, and a new . . . Agreement will be issued to the new owners at that time.

*Your employment with Fremont Ford, Inc. will terminate on the date of termination of our Ford Sales Agreement, and you will be paid all the monies due you.*

We will keep you informed of the effective date of the Buy-Sell Agreement with the new corporation.

*Application for employment with the new ownership may be obtained from your department manager.<sup>23</sup>*

It seems here that Brinkman (with Barnes' apparent knowledge and acquiescence—see fn. 23) contemplated that for *duration-of-employment purposes* the critical date would be the date that the various Ford franchise agreements were reissued to FFSI. This understanding is, of course, consistent with the specific requirement in the buy-sell agreement that "takeover" would precede "closing."

There are at least three additional and undisputed circumstances tending to show that the parties to the sale privately intended that FFSI would take over formal operational and financial responsibility at some point in early May well before May 17. Thus, Barnes acknowledged that the initial deposit in FFSI's local bank account on May 5 came from insurance payments for damage done to the dealership building in an accident

that had occurred shortly before that date. As Barnes explained, it had been agreed that the insurance payment would go directly to FFSI, with the understanding that FFSI would be responsible for repairing the damage to the building despite the fact that leasehold rights had not yet formally passed to FFSI and were still held by FFI. Similarly, Barnes acknowledged that he had placed a newspaper advertisement on an unspecified date in "early May" for a "service special" scheduled to run until May 31, a period spanning the official closing date of May 17, therefore suggesting Barnes' view in "early May" that the takeover was already a fait accompli. Finally, as detailed below, Barnes wrote to the Unions on May 3, offering to discuss the "effects" of the sale of assets on "employees represented by your Union," a seeming admission that he was then in a position to control the future.

#### D. The Alleged Unfair Labor Practices

##### 1. Introduction and comments on credibility

The behavior of Barnes and his agents in the days shortly before and after May 17 is the focus of findings in this section, although some additional background will be narrated. It deserves mention that Barnes and his supervisory agents gave the impression of trying to adhere to a predetermined, generalized line, and they were often evasive, grudging, incomplete, and given to sanitizing when called on to furnish details about their own statements and conduct. Although their ultimate accounts after many rounds of adverse examination are not seriously at variance with those of the nonadverse witnesses called by the General Counsel (employees and agents of the Union), I found the latter to be more candid, sincere, and forthcoming in testifying about some transactions, particularly the conversations within the dealership between and among supervisors and unit employees about their prospects for retention.

##### 2. Evidence of Barnes' intentions to operate "flat-rate" and "nonunion"

In January, Barnes appeared before an industry "Board of Adjustment" called to resolve a grievance over his discharge of a service technician. When the Board of Adjustment ruled against him, Barnes said to the Unions' representatives in attendance, including Machinists 1546 Business Representative Nick Antone, whom I credit: "You guys are not going to be around here. There's no union going to run my store. . . . I'll take care of that when I become the sole owner." Shortly after that service coordinator Smith echoed this, saying to employee Darrell Cooper that Barnes was "mad enough to blow the whole union out of the water."

At some point after plans were set in motion for him to buy the business, Barnes admittedly decided that he would run the service department on a "flat-rate" basis. In contrast to the hourly pay requirement in the labor agreement, mechanics working flat-rate would receive a fixed sum for a specific type of service or repair work, no matter how much time they spent on the work.

<sup>23</sup> This message was admittedly inserted by Brinkman at Barnes' urging. Against the argument that Respondent is not otherwise bound by Brinkman's "understandings" regarding the timing of takeover, I would observe from this that Barnes was involved in—and influenced—preclosing announcements signed by Brinkman.

Unions in this industry are notoriously opposed to flat-rate arrangements. Barnes agreed with the characterization of "flat-rate" as being a "code word" for "nonunion"—at least in the Bay area. In any case, the record amply shows elsewhere—and Barnes does not seriously dispute—that his intention to operate flat-rate was accompanied by an express decision to operate nonunion.<sup>24</sup> Indeed, as events unrolled, the term "nonunion" was used both consecutively and interchangeably with "flat-rate" by Barnes and his agents in discussions about Barnes' operating intentions after his formal takeover.

### 3. Dealings with the Unions and the unit employees as May 17 approached

I have noted that Brinkman issued a series of letters to the Unions and to all the employees of Fremont Ford containing conflicting messages about the dates when FFI's bargaining relationship with the Unions would end and when the employees of FFI would be terminated. I have inferred from Barnes' admitted involvement in the drafting of at least one such letter and from other factors cited above that Barnes was at least knowledgeable—if not influential—in the timing and content of all of them. If nothing else, the fact that FFSI had control over the timing of the closing transactions recommends a finding that Barnes, FFSI's operator-in-place, was the source of whatever confusion there existed about the timing of things.

In any case, Barnes clearly added to the confusion when he announced to the Unions yet another date as the real date on which he would become the "owner." In a letter dated May 3 Barnes, as "President" of FFSI, wrote to the Unions in pertinent part as follows (emphasis added):

This letter will notify [you] *that effective as of May 20, Fremont Ford Sales, Inc. . . . will become the owner* of certain assets of Fremont Ford, Inc. . . .

Please be advised that Fremont Ford Sales, Inc. stands ready to meet and confer with [you] *to discuss the effects this sale may have on the employees represented by your union.*

Consistent with findings above that the parties privately viewed the "takeover" as effective in early May, this letter makes it sound as if Barnes saw himself by then as positioned and empowered to deal on FFSI's behalf with the Unions about future employment terms. It also appears from Barnes' willingness to discuss the "effects" on unit employees of the sale that he had reasonably clear expectations or intentions about the job future of the unit employees. This implicitly suggests that Barnes had an expectation that, at whatever point he might formally be labeled the "owner" of Fremont Ford, his unit employee

<sup>24</sup> Barnes equivocated in testimony about this. His pretrial affidavit contains admissions that he wished to operate "flat rate" and "nonunion" and so informed Smith. Smith testified that Barnes used both terms in their meetings on the subject of his future plans. Coleman testified similarly that he and Barnes talked about "flat-rate" in its code word sense during their March discussions about "labor problems" that could be expected

complement would be composed mostly of current employees.

Similar inferences flow from Barnes' first meeting with a representative of the Unions. On May 6, Machinists 1546 Business Representative Joe Bobo met with Barnes by appointment in Fremont Ford offices. Synthesizing the credible portions of their testimony about this meeting I find that Bobo told Barnes that he hoped to head off a problem before it started and asked Barnes what it would take "to keep this a union store." Barnes then mentioned three "problem" areas to Bobo. He first referred to the subject of seniority for vacation purposes. Bobo reminded Barnes of an arrangement that the Unions had made with FFI when it had bought the dealership that effectively ceded to that successor the right to treat a retained employee's seniority for vacation purposes as starting from the date of business takeover while continuing to treat the employee's original hire date in the operation as the key date for purposes of layoff and recall. Barnes then said that there were "some" employees whom he did not want to retain, not mentioning names, but suggesting that there were "three or four" such unwanted workers. Bobo replied that he had known of an instance where the Unions had agreed to treat the first 30 days after takeover as "probationary" and during which the employer could discharge without recourse under the grievance procedure.

Finally, and obliquely, Barnes raised the matter of a possible flat-rate system by asking if the Unions had any flat-rate shops. Barnes says that Bobo answered abruptly that there were none, whereupon the subject was dropped. Bobo said, more convincingly, that he replied to Barnes' overture by saying that he was "not interested in blazing any new trails, but, you know, everything is open for negotiations."<sup>25</sup>

The meeting ended this way: Barnes said that the sale had not yet closed and he could not make any "commitments" but that he "would be getting back" to Bobo when he became the "total" owner. Bobo said that this would be "fine," and proposed to set up a meeting between Barnes and Bobo's own "supervisor" in the hopes that "maybe they could work something out."

Barnes never did "get back" to Bobo, but there is reason to pause for additional comment about this stage in Barnes' behavior. It is implicit in their credited accounts—and I find—that Bobo was here seeking to prevent terminations of existing employees and thereby a preservation of the continuity of the bargaining unit through the period of closing, however it might be defined. His remarks show his willingness to make concessions that would lessen any incentive that might otherwise prompt Barnes to engage in wholesale terminations before Barnes emerged as the "total" owner. Barnes' ad-

<sup>25</sup> In finding that Bobo expressly left the door open for further negotiations on this subject, I am mindful that it was not a welcome subject for the Unions. I would nevertheless infer from the undisputed willingness expressed by Bobo to be flexible in the other "problem" areas raised by Barnes that Bobo was doing everything he could to obtain Barnes' continued recognition of the Unions on a voluntary basis. While he may have had to swallow hard before saying it, I fully credit Bobo's testimony that he effectively told Barnes that he was willing to negotiate on the subject of a flat-rate system.

missions reflect that he so apprehended this approach. Thus, Barnes showed successive concerns; first about how seniority would be treated (presumably, if he were to retain everyone); then, after Bobo made reassuring remarks on that score about how he might deal with some three or four disfavored employees. It was only after Barnes had received an expression of the Unions' flexibility in areas that might otherwise deter him from retaining certain employees that Barnes obliquely raised the question of the Union's flexibility towards a flat-rate operation in the future.

This all has the air of collective bargaining. Barnes' willingness to meet with the Unions at this stage may be interpreted as a concession by Barnes that he preferred to staff his ultimate work force mostly with current employees and thus recognized that the Unions would continue to be their bargaining representative. Certainly, his remarks to Bobo that only "some" of those current employees were unwanted was a tacit admission that he was prepared to retain the majority of them. Barnes' testimony elsewhere reveals that he had specific concerns about the suitability of only a few current employees, having had almost a year by then to reduce the work force to acceptable dimensions and to remove the obviously undesirable help.<sup>26</sup>

Barnes' willingness to meet with the Unions before May 17 must nevertheless be seen as a kind of pose; for he had already decided to operate nonunion. Indeed, as findings below make clear, he had already put together detailed plans for a hiring process which presumed in advance that there would be no union in the picture and which was apparently calculated to ensure that result. Rather, Barnes' meeting with Bobo seems to have been part of a more general pattern of conduct suggested above and revealed more plainly below—a pattern in which Barnes and his agents sought to conceal Barnes' future operating intentions from the Unions and from the unit employees until the last minute, while encouraging them in the belief that they would remain part of the picture.

From Barnes' and Coleman's sketchy and elliptical disclosures about their conversations on this subject during the week of March 15, it is at least clear that Barnes had then informed Coleman that he planned to run the dealership on a flat-rate/nonunion basis. Coleman voiced no objection from Ford's standpoint, saying that it was up to Barnes how to proceed. The two prospective DD Corp. officers also clearly discussed the subject tactically, admittedly anticipating that "labor problems" would attend Barnes' attempt to operate flat-rate/nonunion.

<sup>26</sup> Barnes testified somewhat inconsistently about his intentions regarding the suitability of existing employees. He explained finally that the reason that he had not already gotten rid of *all* undesired employees was that there remained some who were admittedly "marginal" enough to be able to win their jobs back through exercise of the grievance procedure in the union contract. Elsewhere, he also admitted that he left hiring decisions on and after May 17 to Smith and his departmental subordinates and that he did not prohibit the retention of any current employees. Smith said at one point that *all* the employees were "good" and that there was not "anything wrong" with any of them. See also my analysis of 8(a)(3) issues, *infra*, in which I conclude that Respondent's agents offered conflicting, inconsistent, and otherwise unbelievable reasons for the non-retention of certain employees.

Coleman also told Barnes about another dealership that had been unsuccessful in an NLRB proceeding (apparently involving successorship issues) because its owner had failed to demonstrate a "clear, defined break in ownership." This information admittedly caused Barnes to insist later that every existing employee complete new application forms for work with FFSL. Barnes and Coleman also admittedly discussed the likelihood that the dealership would be picketed at the point when Barnes announced or acted on his intentions.

When, in late April, Barnes confided his intentions to Smith, he also admittedly told Smith to profess ignorance (not only about the intended flat-rate/nonunion changes, but also that a sale was pending) if he were asked about them by any of the unit employees. He gave similar instructions to other shop foremen and managers. When Smith asked why Barnes wanted the current employees to file formal applications (which would contain the background and current employment information already known to the managers or available in the dealership's existing personnel files), Barnes simply said that "it was procedure for dealer development that all prospective employees fill out applications."

Every person working at Fremont Ford was required to complete such applications, including the sales force and the managers and supervisors whom Barnes admittedly intended without reservation to retain. Barnes himself went through the formality of "applying" for employment with FFSL, simply to be consistent with the portrayal of a "clear, defined break."

In fact, the applications that everyone completed were not even consulted during the interviewing and hiring process that ensued on May 17-18. This and the other features already noted cause me to find that the termination/application process was for no independent business purpose, but was purely cosmetic; a process calculated solely to dramatize what was, from the employees' perspective at least, an otherwise hard-to-spot transfer of Fremont Ford's assets into new corporate hands.

Around the first of May, as Barnes admits, he had already drafted for use in the hiring process a highly detailed document, 14 pages in length, captioned "Terms of Employment." This laid out the precise terms that Barnes intended to impose (including specific job-by-job rates under the flat-rate system). It contained a line for employee signatures.<sup>27</sup>

That conduct is further indication that Barnes did not approach or conduct discussions with Bobo on May 6 with any genuine open-mindedness about the possibility that he might continue to recognize the Unions. His preparation by about May 14 of want-ads soliciting outside applicants likewise signals a fixed intention to operate nonunion. Those advertisements that began running on May 16, stated, *inter alia*:

<sup>27</sup> These are not inappropriately called "individual employment contracts" by the General Counsel, who attacks their legality. When Barnes drafted them, he used the same format as that in the current union contract, although the resemblance ends there. Barnes' intended changes as reflected in his "terms" were far more sweeping than those hinted at in discussions between Barnes and Bobo on May 6.

Fremont Ford is under new ownership.

.....  
This is a flat rate house shop.

It was in the specific context of adverse questioning about this advertisement that Barnes conceded that the term "flat rate" was a "code word for 'nonunion'" within the greater Bay-area labor market.

In the period after Smith learned in late April of Barnes' intentions to operate flat-rate/nonunion, Smith was regularly confronted by bargaining unit employees who asked him about Barnes' plans, their own employment prospects, "rumors" that Barnes was going non-union, and similar, predictable inquiries. Smith admits that he consistently "followed instructions" by claiming ignorance of Barnes' intentions. I also find from the accounts of several employees that Smith sometimes compounded the deception. For example, Smith told shop steward Fred Huffstetler, "Don't worry about it. The Union is going to stay. . . . The only thing you have to worry is you're going to lose your vacation time and be put on 30-day probation."<sup>28</sup> I note the similarity of these statements to the message suggested in Barnes' meeting with Bobo on May 6, reinforcing the inference that Barnes was working a calculated deception until the last minute, that he could live with the Unions provided he could get concessions in certain limited "problem" areas.

I also credit the testimony of service writer Marvin Wiggins that both Smith and Radcliff told him, respectively, that he was "guaranteed" a job in the "new" operation, and that he had nothing to worry about. Smith also told Wiggins that the new application was simply a "formality." Similarly, when Smith passed a new job application to Darrell Cooper in early May, he said, "Don't get panicked, nothing is going to change." Cooper asked, "Are we going to be a union shop?" and Smith said "Probably," causing Cooper to pursue the question until Smith said "Yes, we are." There are other examples, merely cumulative on the point that between late April and May 17, Barnes and his agents were concealing—and, at times, inventing—facts pertaining to Barnes' fixed plans.

#### 4. May 17-19: Barnes denies recognition to the Unions, begins interviewing and hiring current employees and outsiders

May 17 was a busy day, with precise sequences in doubt, but it included these events: Barnes told supervisors that morning to tell unit employees to clear personal tools and belongings from the premises before 5 p.m. quitting time. Later (it is not clear whether before or after the meeting of principals where buyout moneys traded hands), Barnes was visited by the Union Representatives Bobo and Day. The meeting was short. Day said they had come to get a contract signed. Barnes said he "had no evidence that [the Unions] represented any of my employees," then added that "it would be a couple of days" before he would be "in operation." Bobo and

Day then left, pausing to confer briefly with shop steward Huffstetler and to mention the possibility of an "informational" picket line when the shop reopened for business. This potential picket threat somehow filtered back to Barnes that day. As noted above, it had been anticipated for months by Barnes and Coleman.

At a later point on May 17 Barnes had one or more meetings with Smith and some supervisors where he laid down basic instructions for interviewing and hiring. Smith, who conducted most of the interviews, and Fleming, who helped out, gave testimony from which I find that Barnes told them both that he intended to be a "nonunionized organization," and that applicants should be told this. Barnes also directed that employees should go over the 14-page package of "terms" prepared by Barnes, with the understanding that they would sign it as a condition of hire. Finally, Barnes told them that he was "looking for skilled people who would be willing to cross a picket line" and authorized his interviewers to promise such candidates that they would be guaranteed 40 hours' pay each week as a hedge against any lack of work due to the possible picketing.

Smith said he participated in most of the interviews to be sure that Barnes' instructions were followed and especially to go through the written employment terms with each applicant. Although Smith says that Barnes also told his interviewers not to "discriminate" on the basis of "union activity," Smith admittedly took Barnes' overall instructions to mean, *inter alia*, that Barnes would need employees "sympathetic" to his intended nonunion status.

Smith also readily admitted that many employees interviewed on May 17 were ruled out from further employment consideration based on their declared refusals to work in a nonunion shop or to cross a picket line.<sup>29</sup> Fleming also admits as much, although his admissions were not as candid and only followed transparent and unworthy attempts to convince listeners that applicants' responses in this area had no bearing on their suitability for hire in the post-May 17 operation.

Accordingly, while more might be said, case by case, about the details of some of the May 17 interviews, one central feature is clear; they were not conducted for the purposes that one normally supposes an employer has in mind (e.g., to ascertain an applicant's employment history or communications skills or technical specialties). These were admittedly known factors in the case of the current employees at Fremont Ford. Rather, as Smith admitted, the "only thing" that he did with each applicant on May 17 was "to go over what the new contract would be that [Barnes] would want them to enter into"; and the "only thing" that Smith "really didn't know about them was . . . whether or not they wanted to cross a picket line and work in a non-Union shop."

The May 17 interviews are thus more properly understood as a kind of particularly coercive polling process

<sup>28</sup> Service Manager Radcliff also told Huffstetler and others roughly the same thing ("No problem Don't worry about it We're going to stay union")

<sup>29</sup> In testimony on May 6, Smith specifically named six employees ruled out in this connection: S Kirkendall, D. Burkhardt, D. Cooper, W. Deetz, F. Huffstetler and J. Lawson. Smith's testimony elsewhere suggests that the list should be larger by at least one name, Marvin Wiggins. See also, Analysis, *infra*, dealing with the case of David Lawson.

where, as a condition of further consideration, current employees must express "willingness" to work in a non-union setting, according to terms set forth in individual employment "contracts," and in the face of probable picketing. Although Barnes may have issued formal instructions to Smith and to his other interviewers not to "discriminate" based on "union activities" in their eventual hiring choices, it is plain that Barnes' instructions necessarily required that discriminations be made by his hiring agents linked to the current employee/applicant's willingness to forgo union representation as a condition of his continued employment at Fremont Ford. Smith so understood them, as evidenced by his conclusion that he must select for retention only those "sympathetic" to Barnes' plans.

The May 18 interviews with the outside applicants differed in certain respects from those on May 17. More than one hundred outsiders filed through and were hurriedly interviewed, two-by-two, to determine their threshold qualifications. A relative few of them were deemed sufficiently qualified to warrant protracted discussions. It was only in those latter cases that Smith, Fleming, and Radcliff took the trouble to go over in detail Barnes' nonunion, flat-rate intentions and to ascertain the candidates' willingness to go along with that program and to cross a picket line, if need be.

It requires no squinting to see that the interview process as a whole was really a means by which to deliver ultimatums to prospective employees; that they either forgo union representation and be willing to cross a picket line and work flat rate, or that they look elsewhere for work. The unit employees who were allowed to come to work on Wednesday morning, May 19, were necessarily persons who had convinced Smith and the other hiring agents that they would abandon union representation if that was required to keep a job in the "re-opened" Fremont Ford operation.

5. The unit complement before and after the May 19 reopening; observations about the shrinkage

There were 22 unit employees at Fremont Ford on May 17; there were 10 when the doors opened again on May 19. All 10 employees in the May 19 complement had been unit employees in the May 17 complement.<sup>30</sup>

<sup>30</sup> The table below adapts a stipulated list of the 22 unit employees on May 17, with asterisk indicating the 10 carryovers as of May 19. As noted separately, some additional May 17 employees later returned to work across the picket line. Others were later sounded out but indicated unwillingness to return on Barnes' terms. The examination of Smith at Tr. 741-751 about the specific duties and departmental status of each individual is relied on for general classification purposes.

<i>Shop and service department:</i>	<i>Body shop department:</i>
Steve Kirkendall	Dan Clark*
Virgil Bilbrey	William Deetz
Dan Burkhardt	Robert Gonzales*
Darryl (Darrel) Cooper	Charles Kiesling
Mel Fosen	Manuel Rodiez*
Mohammed Khan*	<i>Parts Department:</i>
John Lawson	David Lawson
David Rabin*	Terry Evans
Charles Rudnick*	

Barnes and Smith offer inconsistent testimony about the precise reasons for the shrinkage in the unit complement and the precise numerical limits Barnes imposed on hiring for a May 19 complement. There is a consistent strain in their testimony that Barnes intentionally limited the unit complement because of anticipated drops in service business from expected picketing. But, curiously, there were no corresponding reductions in the sales force (which was retained largely intact; i.e., all but 2 of about 18 salespersons, if Barnes' vague recollection can be credited). Barnes' explanations—particularly about the latter anomaly—seemed improvised and half-hearted.

Smith's testimony did not clarify the picture. He said at one point, seemingly trying to rationalize the size of the unit complement on reopening, that 10 employees was "normal" considering the available work in the period immediately preceding the takeover.

Adding to doubt about the adequacy of explanations for Barnes' alleged imposition of a starting ceiling no higher than 10 employees is the fact that in the following week Supervisors Fleming and Radcliff continued to call former unit employees to sound them out about their willingness to accept Barnes' terms. Here I rely on admissions made by Fleming and Radcliff and, where there may be conflict, on the more specific testimony of employees Cooper, Evans, and Huffstetler. See, for example, Huffstetler's testimony that Radcliff called him and asked if he would come back if Smith were no longer in the picture. Huffstetler said he might, if the shop were "union." Radcliff asked: "What if it is not union?" Huffstetler replied: "Well, I don't think so." In addition, three more employees from the complement (J. Lawson, S. Kirkendall, and V. Bilbrey) were back to work within 2 weeks of May 19.

All of this makes it sound as if Barnes was prepared to reopen with an even larger unit complement, i.e., as many as he could find provided they had purged themselves of any notion that there would be any continued union presence. In any case, I conclude that the haltingly uttered and inconsistent explanations advanced by Barnes and Smith for the May 19 shrinkage in the work force do not illuminate Barnes' underlying rationale except—indirectly—as they suggest concealment of purposes which Respondent found it to be not in its interests to disclose.<sup>31</sup>

To penetrate more deeply into Barnes' tactical judgments on a record where Barnes seemed to try his best to conceal them would require speculation about the details of his reasoning processes and an assessment of the adequacy of his understanding of the law of successorship—otherwise academic points. The credible record nevertheless preponderates on the side of these broad conclusions: First, through concealment of his intentions and by the broadcasting of false signals before May 17,

John Pack*	Charles Ross*
Marvin Wiggins	<i>Combination departments.</i>
Fred Huffstetler	Robert Hernandez*
<sup>31</sup> <i>Shattuck Denn Mining Corp.</i> , 151 NLRB 1328, 1336 (1965), enfd 362 F 2d 466, 470 (9th Cir 1966).	Epifano (Beaver) Reyna*

Barnes was trying to postpone the point of reckoning with the Unions until the asset transfer, even though his plans were fixed before then. Second, by a contrived and coercive process resulting in a "reopening" with a complement reduced by more than 50 percent, Barnes was trying to blur the legal picture from a "majority" standpoint, thereby further postponing the day of reckoning and perhaps guaranteeing that the eventual "full" complement would consist mostly of newcomers.

#### 6. The picketing and its aftermath

The Unions picketed Fremont Ford for about 2 months after May 19. There was an exchange of correspondence between counsel for the Unions and for Respondent in September in which legal positions are set forth that do not need to be recorded here. During that period, there were additional hires.<sup>32</sup>

### III. ANALYSIS, CONCLUSIONS OF LAW

#### A. Bargaining Duty and 8(a)(5) Issues

##### 1. General legal setting

"The subject of successorship is shrouded in somewhat impressionistic approaches." *Machinists Lodge 94 (Lou Ehlers Cadillac) v. NLRB*, 414 F.2d 1135, 1139 (D.C. Cir. 1969). "There is no fixed definition of 'successor,' nor is there a uniformly accepted set of obligations which flow from the determination that, in certain circumstances, a party is a 'successor.'" 1 Morris, *The Developing Labor Law* 795 (2d ed. 1983).

Whatever may be said about Respondent's potential legal duty to continue a bargaining relationship with the Unions it is not disputed that Respondent is a "successor" in the nontechnical sense that it always intended to, and did, "continue" virtually intact the car sales and service operation which has at all times done business under the name "Fremont Ford." Indeed, "continuity" in operations was deemed sufficiently important to affect even the choice of Respondent's corporate name when the plans were made to set up a DD Corp. through which Barnes might buy the Fremont Ford assets formerly held by the predecessor, FFI. I do not dwell further on the obvious operational "continuity" associated with Respondent's acquisition of Fremont Ford.

The more important question here (and in virtually all successorship cases arising under the NLRA) is whether there can be said to have been sufficient continuity in the complement of employees employed by the otherwise continuing employing enterprise. More specifically, the question of legal successorship has devolved, for better or worse, to an inquiry into whether a "majority" of employees in the successor operation (at an appropriate

<sup>32</sup> Respondent contends that there were 28 employees in the unit complement as of September 27—a date deemed significant by Respondent for "majority" counting purposes, a minority of whom were unit employees on May 17 (See R. Br 55-56, including table of hires totaling only 13.) Respondent has not indicated with any clarity the sources in the record (generally omitting citations), nor the reasoning underlying its assertions in this regard—a matter of no ultimate moment (see sec III)

time for counting) were carried over from the predecessor operation.<sup>33</sup>

These are some additional considerations that the Supreme Court has held may properly influence the questions whether a successor in the operation of a business may be treated as having acquired in the process some or all the labor relations obligations which bound his predecessor.

The Court said in *Wiley*:<sup>34</sup>

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 businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship . . . . [376 U.S. at 549.]

And the Court said in *Burns*:<sup>35</sup>

It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an "unusual circumstance" as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer. [406 U.S. at 279]

. . . .  
 . . . where a bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent<sup>36</sup> there is little basis for faulting the Board's implementation of the express mandates of Sec. 8(a)(5) and Sec. 9(a) by ordering the employer to bargain with the incumbent union. [Id at 281.]

The *Burns* Court left no doubt that a labor relations successor will not normally inherit his predecessor's

<sup>33</sup> Thus, while the Board has at times set forth a kind of checklist containing a variety of factors for determining whether an employer is a "successor" in the technical sense of having acquired labor relations obligations (see, e.g., *Stewart Granite Enterprises*, 255 NLRB 569, 572 (1980)), one must resist the implication that factors other than the majority factor carry any real weight in the ultimate determinations. See, e.g., *Zim's Foodliner v. NLRB*, 495 F.2d 1131, 1140 (7th Cir 1974) Accord *Saks & Co v. NLRB*, 634 F.2d 681 (2d Cir 1980).

<sup>34</sup> *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964)

<sup>35</sup> *NLRB v. Burns Security Services*, 406 U.S. 272 (1972)

<sup>36</sup> Although the Court here alluded to the "recent certification" of the union involved in *Burns*, it has been repeatedly held that when other factors favoring treating an employee as a successor are present, it is of no significance, as in this case, that the union may not have been "recently" certified, or that it may owe its exclusive representative status to some lawful process other than a Board certification. *Stewart Granite Enterprises*, supra, at 572, fn 16, and authorities cited

labor agreement unless he adopts or tacitly assumes it. 406 U.S. at 281-91. See also, e.g., *World Evangelism*, 248 NLRB 909 (1980), *enfd.* 656 F.2d 1349 (9th Cir. 1981); *Audit Services v. Rolfson*, 641 F.2d 757, 763 (9th Cir. 1981).

There is greater doubt regarding precisely when a successor must recognize and bargain with the incumbent union when he has not adopted or assumed the predecessor's union contract. In dicta, the *Burns* Court suggested two paradigms. In one, where it is "perfectly clear" that the successor's complement of employees will be composed in the main of the bargaining unit employees of his predecessor, the Court said that the successor must "initially consult" with the incumbent union before making any changes in the predecessor's terms and conditions of employment. 406 U.S. at 294-295. The Court also envisioned a category of cases at the other end of the continuum where it would not be until after the successor has hired a "full complement" that it will be apparent whether a majority of the employees will be from the predecessor unit and, therefore, it will not be until such full complement is hired that a duty to bargain may arise. *Ibid.* In the meantime, the Court said, such employers are free to set "initial terms" of employment without consulting with the predecessor union. *Ibid.*

The *Burns* Court did not purport to define with precision the circumstances that would make it "perfectly clear" that a prospective employer intended to use mostly predecessor employees in his new operation; neither did the Court elaborate on the conditions that must obtain before a successor might claim the right to "wait and see" how the hiring shook out before dealing with the questions of recognition and bargaining with the union representative of the predecessor complement. The Board has said that "the precise meaning and application of the Court's [perfectly clear] caveat is not easy to discern." *Spruce Up Corp.*, 209 NLRB 194 at 195 (1974). And it is well to recall the general admonition of the Court in *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 256 (1974) that:

Particularly in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its evolution, emphasis on the facts of each case as it arises is especially appropriate.

Mindful of these general principles and considerations, I turn next to their appropriate application herein.

## 2. Did Respondent ever become a successor for labor relations purposes?

Respondent claims under *Burns* that it was entitled on May 17-19 to impose "initial terms" on prospective employees and then to wait until a "full complement" was on board before making the head count that would determine whether it owed a duty to recognize the Unions. Respondent argues that it was not until September 27, more than 4 months after its admitted acquisition of the assets of the business, that such a complement was achieved, which September 27 complement proved to in-

clude only a minority of "predecessor" employees. This configuration, Respondent argues, left it free to ignore the Unions.

I set aside doubts expressed earlier about the adequacy of Respondent's proof regarding the eventual composition of the unit on September 27 and whether, as Respondent asserts, 28 is a "full complement."<sup>37</sup> Assuming that Respondent's assertions on that subject are supported by this record, I conclude that they are irrelevant. Rather, I conclude below that Respondent owed a duty to recognize the Unions much earlier, but in any case by no later than May 19, in the light of the "majority" configuration of the unit on that latter date.

### a. Successorship by takeover before asset transfer

An employer in a business takeover need not have acquired title to the assets of the business before he may be treated in law as the successor for collective-bargaining purposes. *East Belden Corp.*, 239 NLRB 776, 791 (1978); *Sorrento Hotel*, 266 NLRB 350, 356-357 (1983), and authorities cited. See also, e.g., *Carlton's Market*, 243 NLRB 837, 845 (1979). Rather, where a prospective buyer steps into the management of a union-represented business pending a conclusion of the sale of assets and does not then substantially alter the composition or appropriateness of the bargaining unit, he will be treated as a successor fitting within the "perfectly clear" exception suggested in *Burns* as triggering a duty to recognize and bargain with the incumbent union before making any subsequent changes affecting employment in the bargaining unit. *Sorrento Hotel*, *supra* at fn. 23.

In essential agreement with the principal position urged by the General Counsel, I conclude that for many months before May 17 Respondent occupied the same status as the pre-asset-transfer successors in the cited cases, with the legal consequence that Respondent was not free unilaterally to change at a later date the conditions of employment that were maintained in effect when it took over the management of Fremont Ford. Accordingly, and without regard to questions of the "majority" configuration as of May 19 (or September 27, or any other post-May 17 date) I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by all complained-of actions on and after May 17, and by some actions before that, as well.

Respondent devotes considerable attention on brief to attempts to distinguish this case from the *East Belden* line of cases, *supra*, citing some factors present in one or more of them that do not appear in this case (or vice-versa). This is an essentially sterile approach, however, for comparison among the factual settings of this and the cited cases discloses hundreds of factual differences but few, if any, legally significant ones.<sup>38</sup> The *East Belden* cases have materially in common that they each involve a buyer who has already taken over substantial control of the employing enterprise under circumstances where

<sup>37</sup> See fn. 32.

<sup>38</sup> An example of a potentially significant difference. This case shows more strongly than some of the cited cases that the actual control of the business had been in Barnes' hands for at least several months before the May 17 closing transactions.

both buyer and seller have every expectation that the sales transaction will close.<sup>39</sup>

Respondent also argues ultimately regarding the *East Belden* cases that "the crucial factor is when the succeeding enterprise took over from the predecessor for its own benefit." I do not agree that those cases may be properly interpreted as setting forth a test for legal successorship that requires an analysis as to whose "benefit" is being served by the interim management of a business by a buyer-in-place. At best, those cases merely depict a uniform rejection by the Board of the claims by the respective successors that their interim management was merely a kind of "caretaking" for the "benefit" of the seller. To that extent, if anything, those cases seem to apply something close to a presumption that the buyer-in-place is operating for his own "benefit." *East Belden*, supra at 791; *Sorrento Hotel*, supra at 356-357; *Carlton's Market*, supra at 845; see also *Ethan Allen, Inc.*, 218 NLRB 208, 217 (1975), enf. in pertinent part 544 F.2d 742 (4th Cir. 1976).

I also believe that a "benefit" test could not reasonably be a useful guide for determining questions of employees' rights under the Act in a successorship setting involving a buyer-in-place. For one thing, such takeovers as are presented here and in the *East Belden* line inevitably serve the "benefit" of both buyer and seller in some sense, and it is not at all clear in most instances how one might allocate between buyer and seller the "benefit" to be derived from any given management action of the buyer-in-place.

In any case, for reasons discussed above, it is evident that Barnes took actions in the management and operation of Fremont Ford before May 17 which served his ultimate "benefit" as buyer more than it served any identifiable interim interests of Brinkman-Pettitt. I have in mind here Barnes' wholesale management reshufflings, and his extraordinary expenditures such as those involved in the reorganization of the service department hierarchy, especially the costs of bringing Smith into the operation from Idaho. Even more clearly, Barnes' use of his own business time and that of his subordinates (particularly Frances Baker) in laying the groundwork for his own purchase of the business, all done while those persons were still on FFI's payroll, shows that Barnes was using the dealership and its personnel for the benefit of Barnes/FFSI well before Respondent would concede that FFSI had taken over for its own benefit.<sup>40</sup>

Accordingly, a "benefit" analysis leads either to a dead end or, as applied herein, it does not truly enhance Respondent's case.

<sup>39</sup> E.g., *Sorrento Hotel*, supra at 352, in which the successor took over interim management of the business expressly "in anticipation of a successful conclusion of negotiations."

<sup>40</sup> Of course it could be argued by Respondent that these actions also worked to the "benefit" of FFI since it was in FFI's interest as well that there be a prompt closing of the sale, free of any hitches that might otherwise be present if Barnes and Baker, et al., had not taken those "anticipatory" steps. But this merely brings us back to the first point, that in situations like this it is not legally productive to attempt to sort out whose "benefit" is really being served when a prospective buyer has already taken over the basic operation of the business while waiting for the sale to close.

Exactly when Respondent might be said to have "taken over" Fremont Ford is admittedly a matter for reasonable debate. The general public in the Bay area (necessarily including the Unions and the bargaining unit employees of Fremont Ford) could be forgiven for believing that the takeover occurred when Barnes depicted himself as the "new owner" in September 1981, and began conducting his advertising campaign based on the theme, "new dealer—new deal." But, while I have found that Barnes and Brinkman-Pettitt's association in July 1981 was "influenced" by the prospect that Barnes would eventually buy out the business, I have no record basis for finding that there were any clear plans at that time for a sale to Barnes. Because of this, and because there is no evidence that Respondent (i.e., FFSI) existed even inchoately at that time, I do not find any clear warrant for treating Barnes as having acquired any significant status as a successor at that early date. Neither would such a finding affect my recommended disposition of this case.

I would reject even more quickly the May 17 (or 19), 1982 dates posited by Respondent as the true date(s) on which Respondent "took over" the operation. Respondent's takeover clearly was contractually perfected no later than May 7. Among other factors noted above, I have found that it was on that date that Ford treated Respondent as the new operator with exclusive rights to the franchise, it was on that date that Ford drafted the funding check for the DD Corp., and, it was on "approximately" that date that the formal "takeover" specified in the buy-sell agreement would take place. By this time, Barnes, acting as president of FFSI, had already invited bargaining with the Unions and had even engaged in one "bargaining" session with the Unions' representative, Bobo, on the subject of the effects of the sale on unit employees. Moreover, Respondent expressly admits (Br. 13) that Respondent "began operations in early May," a concession that cannot be squared with its position elsewhere that its takeover of the business did not occur until on or after May 17.

In the final reckoning, however, the question when Respondent succeeded to the operation of Fremont Ford is not answered simply by relying on formal agreements, or records reflecting the subjective beliefs of parties to the sale about who actually had the "rights" to the franchise on a given day, nor by other subjective (and often inconsistent and self-serving) understandings or statements of the parties to the sale as to when the transaction would be deemed to be complete. Rather, the *East Belden* cases suggest that the "takeover" is more properly understood as the act of managing the business by the buyer after the agreement to sell has been reached.

Judged from that perspective I have no difficulty in concluding that the takeover occurred in January 1982 when the key parties agreed that Barnes, already the "operator," would become the buyer of the business as soon as a DD Program package could be put together. It was at this point that Barnes acquired a new status, that of buyer-in-place; and it was from that point onward that his operation of the business may be seen as a "succession" in the same sense in which the prospective buyers

in the *East Belden* cases were deemed to have become the successors by virtue of their entry into the operation of businesses that they intended to buy.

However much Respondent might insist that the January arrangements were still tentative and technically subject to repudiation until May 17, it is clear from the findings above that Brinkman-Pettitt and Barnes (experts in the business with a long history of Ford dealership experience behind them) clearly counted on and fully expected that the deal would go through without substantial hitch. Rather than closing the doors, Brinkman-Pettitt committed themselves for the next several months to financial participation in a dealership that they had pronounced nearly dead 6 months earlier and that had continued by their own account to be a hemorrhagic drain on their resources. So far as this record shows, they had no other takers for the business when they decided to sell to Barnes. For his part, Barnes clearly felt that the DD Program application would be approved, despite his testimonial hedging. This record contains no indication of any other reason why Barnes would stay on as Fremont Ford's general manager after it was declared in January to be in such bad shape that it was "30 days from closing." Neither does the record suggest that Barnes had any backup plans to support himself if the sale via the DD Program were to fall through.

I am thus more influenced by the actions in detrimental reliance taken by these experienced gentlemen in January than by any abstract arguments about the technical legal defeasibility of their agreement when I reach this conclusion: January marked a clear point at which Brinkman-Pettitt effectively turned the operation over to Barnes, certain that he would buy it under a program familiar to all of them. By then Brinkman-Pettitt clearly knew they could not get their money out of the business unless and until the DD Program application could be perfected and the necessary arrangements for the creation of a DD Corp. could be made. They had to cooperate to close the sale, and they must have appreciated as well that Barnes, as buyer and as current operator, would have the greater leverage in any contest over management decisions in the meantime.

If, despite the detrimental reliance of the parties to the sale, the January agreement between Barnes and Brinkman-Pettitt is not a clear enough point of demarcation for concluding that an *East Belden* type of successorship then occurred, there can be no doubt that by March 19 Respondent's status as such a successor was clearly fixed. By then a specific DD Corp. had been conceived and named. By then there had been formal recognition that Barnes could no longer appropriately act as an agent of FFI, hence his resignation from the presidency of that corporation; and there was formal recognition as well of his status as the agent for the prospective DD Corp. There were no apparent obstacles to the conclusion of the transaction. Coleman had been thorough in preparing papers and getting necessary signatures. Specific, detailed understandings had been reached regarding the precise terms and conditions under which the assets would change hands, and similarly specific provisions had been made to ensure that Respondent would have control over the operation pending the closing and transfer of

assets.<sup>41</sup> As in *Sorrento Hotel*, supra at 357, "By the time of Respondent's . . . assumption of management responsibility, its prolonged continuation in that role was a virtual certainty, the 'basic terms' of the long-term . . . agreement previously having been worked out."

Accordingly, by March 19 at the latest, Respondent's status was so clearly fixed that its continuation of the operation with the same employees thereafter rendered it the legal successor to the relationship previously maintained between the owners of Fremont Ford and the Unions. Also, consistent with the analysis in the *East Belden* cases, Respondent then owed a duty to bargain collectively with respect to any future changes having an impact on unit employees' terms and conditions of employment. This included, inter alia, a duty to notify and bargain about intended en masse terminations in the unit and the standards for selecting who would be retained in a shrunken complement. See, e.g., *Sorrento Hotel*, supra at 358. See also, e.g., *Valley Iron & Steel Co.*, 224 NLRB 866, 877 (1976) (selection of employees for layoff an important condition of employment and proper subject for collective bargaining).

b. *Did Respondent become bound to the contract*

Consistent with conclusions above that Respondent's legal successorship attached in January, it is evident that Respondent's admitted honoring and applying of the Union contract for roughly 5 additional months amounted to an assumption of that contract. *Burns*, supra, 407 U.S. at 272; see also, e.g., *Audit Services*, supra, 641 F.2d at 763. The same conclusion would hold if Respondent's legal successorship did not attach until March 19, there still being a substantial period after that during which Respondent honored and applied the labor agreement in all respects.

There are at least three other distinct bases for treating Respondent as having acquired a successor's obligation to recognize and bargain with the Unions herein, although each theory carries with it a somewhat different mix of remedial obligations.<sup>42</sup> I summarize below the alternative bases on which it may be found that Respondent violated Section 8(a)(5) by refusing to recognize the Unions as its employees' representative.

<sup>41</sup> I refer here not only to the formal provisions in the buy-sell agreement ensuring that the status quo would be preserved for Respondent's benefit pending the closing, but also to the more fundamentally important fact that Barnes, FFSI's acknowledged agent, was already running things. Indeed, although the formal provisions in the buy-sell agreement assume a situation where the buyer is an outsider needing rights of access and supervision to ensure that the seller does not waste or otherwise devalue the subject business, the real situation here was essentially the reverse. By then, it was the *sellers* who were on the outside looking in, so complete had been their surrender of operational control to Barnes.

<sup>42</sup> Since I am persuaded that the most appropriate and comprehensive remedy for the violations of Sec 8(a)(5) that I have found under an *East Belden* analysis is to require Respondent to restore the overall status quo ante May 17, I do not address the potential variances in remedy for violations found under alternate theories set out below.

c. *Alternative grounds for finding successorship*

1. Voluntary recognition before May 17

Even ignoring that Respondent was a buyer-in-place before the asset transfer, it may be found alternatively herein that Barnes planned to operate after May 17 with a substantially unchanged complement; or at least that such was his plan through May 6. When Barnes invited bargaining with the Unions over the effects of the sale of Fremont Ford on unit employees and when he met with Bobo on May 6 and expressly told Bobo that he had doubts about the suitability of only "some" of the employees, it was "perfectly clear" from that conduct that a majority of employees would be retained. Indeed, Barnes implicitly and properly conferred recognition on the Unions by that conduct. His later change of heart and disavowal of a relationship was therefore unlawful. See, e.g., *Bellingham Frozen Foods*, 237 NLRB 1450, 1463-1464 (1978), enfd. in pertinent part 626 F.2d 674 (9th Cir. 1980), cert. denied 449 U.S. 1125 (1980).

2. Section 8(a)(3) "but for" theory

The complaint alleges, and I agree (see sec. IV, (B), *infra*) that Respondent's action in terminating employees en masse and in failing thereafter to rehire some of them independently violated Section 8(a)(3) and (1).

If those acts of discrimination had not taken place, Respondent would have employed on May 19 those additional 12 employees found below to have been unlawfully denied rehire. Adding their numbers to the employees who were retained on the May 19 "reopening" date clearly yields a majority in what Respondent conceded is a typical "full complement" in the reopened operation (i.e., 22 of 28). Where, but for unlawful discrimination in the retention of predecessor employees, a successor would have retained enough of them to constitute a majority of employees in his new complement, the successor will be deemed to have owed a duty to bargain with the predecessor union—indeed the duty will be deemed to have attached before the point at which he might otherwise lawfully impose "initial terms" on a unilateral basis. See, e.g., *Potters Drug Enterprises*, 233 NLRB 15, 20 (1977), enfd. mem. 584 F.2d 980 (9th Cir. 1978).

Accordingly, even if Respondent had never set foot inside Fremont Ford's doors before taking it over, its inherently discriminatory hiring process warrants treating it in law as a successor who owed a duty to recognize and bargain with the Unions before making any changes in bargaining unit working conditions.

3. "Representative complement" theory

Since *Burns*, the Board, with the approval of the courts of appeal, has interpreted a potential successor's duty to bargain with the predecessor union as being perfected as soon as it has hired a "representative complement" a majority of whom are from the predecessor unit, and even though, in some sense, the successor's "full" complement might not be reached until some indefinite future point. *Hudson River Aggregates*, 246 NLRB 192 (1979), and authorities at fn. 3, enfd. 639 F.2d 865, 870 (2d Cir. 1981); *Pre-Engineered Building Products*, 228

NLRB 841 (1977), enfd. 603 F.2d 134, 136 (10th Cir. 1979); *Premium Foods*, 260 NLRB 708 (1982), enfd. 709 F.2d 623, 628 (9th Cir. 1983) ("The count need not be delayed until the employer has completed the hiring of all employees in the bargaining unit").

Searches for an elusive "majority" in cases like this can be attenuated. But it is at least clear that when the doors of Fremont Ford opened on May 19, the complement of 10 employees then on hand was "substantial and representative" in the sense in which the cited authorities use the term. See, e.g., *Premium Foods v. NLRB*, *supra* at 630. The May 19 complement would also meet the tests enunciated in *General Extrusion Co.*, 121 NLRB 1165, 1167 (1958).<sup>43</sup>

Accordingly, even under the interpretation of these events most favorable to Respondent, and ignoring Respondent's pre-May 17 takeover of the operation, Respondent's bargaining duty clearly attached when it opened its doors on May 19 with a representative complement of employees who had all come from the ranks of the predecessor operation. Respondent was not entitled to "wait and see" for 4 months more how the "majority" picture might change.

B. *Independent 8(a)(3) and (1) Issues*

Here I address only the discrimination and related coercion visited on members of the bargaining unit by Respondent's mass terminations and subsequent tainted interview and rehire processes.<sup>44</sup>

<sup>43</sup> In *General Extrusion*, the Board held that at least 30 percent of the ultimate complement and 50 percent of the job classifications must be in existence at the time a labor agreement is signed in order for the labor agreement to bar a representation election in the unit. Assuming without deciding that the same tests would apply here, it is clear from findings above (at fn. 30) that the May 19 complement was "representative" in the *General Extrusion* sense. Thus, the exact size of the unit complement on September 27 (when Respondent says the count should have been made) is alleged by Respondent to have been 28. Assuming this to be the case (but see fn. 32), the startup complement of 10 employees on May 19 was clearly sufficient to meet the *General Extrusion* "30 percent-of-complement test. Since all or virtually all the job classifications in Respondent's "ultimate" (i.e., September) complement likewise existed as of May 19, this satisfied the "50 percent-of-classifications" test.

<sup>44</sup> The complaint alleges (at par. 34) that 47 named persons were terminated on May 17 and (at par. 38) that those terminations violated Sec. 8(a)(3) and (1). Those 47 named individuals include not only the 22 bargaining unit employees on hand on May 17, but also (apparently) all other persons in Fremont Ford's employ on that date (sales, clerical, supervisory, managerial, etc.). The complaint elsewhere alleges that Respondent independently discriminated against 13 named bargaining unit employees by failing to rehire them upon the May 19 reopening. The latter list is at minor variance with the proof (see discussion, *infra*, in main text).

The General Counsel has apparently abandoned the allegation that the termination on May 17 of nonbargaining unit personnel constituted independently unlawful discrimination under Sec. 8(a)(3). The record does not systematically show whether the names of nonunit personnel in par. 34 were, in fact, the ones terminated on May 17. The matter received no attention in the General Counsel's posttrial brief (nor in those of the other parties). I assume that the General Counsel's par. 34 allegation was grounded on the legally defensible proposition that employees who are not the direct targets of an unlawfully discriminatory plan may nevertheless be coerced in the exercise of Sec. 7 rights when they are incidentally harmed by discriminatory actions against the target group. I would agree that violations of Sec. 8(a)(1) necessarily occurred when nonunit employees underwent the meaningless ritual of being terminated and being required to resubmit employment "applications." I would not find in the

*Continued*

The operative complaint paragraph names 13 unit employees from the May 17 unit complement as having been wrongly denied rehire. That allegation is at variance with the otherwise agreed-on proof as to the hiring shakeout on May 19 that 12 employees from the May 17 complement were no longer on board on May 19.<sup>45</sup>

I have found that Respondent owed a duty to bargain over such matters as intended mass terminations and rehire terms for unit employees and I provide a recommended make-whole remedy below that would require offers of reinstatement and backpay to all employees in the unit on May 17. It is therefore arguably superfluous to consider the independent discrimination issues. But because the individual cases have common aspects of discriminatory character, and because Respondent's defenses are susceptible of summary treatment, I deal with the discrimination counts if for no other reason than to demonstrate the existence of alternative grounds for imposing an essentially similar status quo ante remedy.

### 1. Prima facie case

The overall patterns of Barnes' admitted behavior and motivations constitute the prima facie elements in the discrimination cases. First, of course, is Barnes' declared intention to switch to a nonunion operation. See, e.g., *Love's Barbecue Restaurant*, 245 NLRB 78, 80 (1979) ("Kallman's conceded intention not to allow the employees to be unionized itself supports a conclusion of illegal motive"), enfd. in pertinent part 640 F.2d 1094, 1097 (9th Cir. 1981). The mass firings and the rehiring process in which employees were handed ultimatums which expressly included statements that the reopened operation would be nonunion were clearly parts of Barnes' final solution—essentially to blast through to nonunion status.

It is also clear in all the circumstances detailed in findings, supra, that requiring prospective employees to express a willingness to cross a picket line and to work "nonunion" as a condition of their retention violates Section 8(a)(3) of the Act. See, generally, *East Belden*, supra, 239 NLRB at 1794-1795. See also, e.g., *Love's Barbecue*, supra, 245 NLRB at 79. I would reach a similar conclusion with respect to Barnes' insistence that prospective employees sign individual employment contracts where it is clear that this was part of his program to drive home the point that employees must forfeit union representation as a condition of retention. See, e.g., *J. M. Tanaka Construction*, 249 NLRB 238 (1980), enfd. 675 F.2d 1029, 1036 (9th Cir. 1982).

circumstances that any identifiable nonunit employee suffered independently unlawful discrimination under Sec. 8(a)(3). Neither in the circumstances would I impose upon the Board's compliance processes the task of attempting to figure "lost" earnings for nonunit personnel. This could conceivably involve, for example, attempts to divine how many cars a salesman might have sold but for the May 18 shutdown of operations (the only date on which it might be argued that the "terminated" nonunit employees suffered a loss of work opportunity). My recommended remedy does, however, address the matter of incidental damage done to nonunit employees' rights by Respondent's violations.

<sup>45</sup> See and compare complaint par 53 with findings at fn 30. The complaint erroneously suggests that Charles Ross and John Pack did not carry over to May 19. The complaint omits John Lawson from the group of those who were not immediately returned to work on May 19.

With the hiring process thus tainted a prima facie case was made that the Fremont Ford employees who were not retained were the victims of unlawful discrimination. Smith independently conceded that six named individuals were ruled out from consideration based on nothing more than their expressed unwillingness to go along with Respondent's ultimatums. I also find that there are others whom Smith failed to list whom Respondent would have put to work immediately on reopening or within a few days thereafter had it not been for their continued expressions of unwillingness to accept Barnes' unlawful package of terms. As I find below, Respondent failed in each instance to meet its burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), of demonstrating that those employees would have been terminated even if they had never engaged in protected conduct.

### 2. Respondent's defenses

In the cases of *Steve Kirkendall*, *John Lawson*, and *Virgil Bilbrey*, any evidence that Respondent may have put into the record with respect to their potential unfitness (and I detect none) does not outweigh the admitted fact that they were returned to work within 2 weeks of May 19, making it difficult for Respondent to argue seriously—let alone meet its *Wright Line* burden of demonstrating—that those employees would have been fired even absent their initial (protected) unwillingness to work on Barnes' unlawful terms.<sup>46</sup>

A similar analysis is warranted with respect to employees *Darrell Cooper*, *Terry Evans*, and *Fred Huffstetler*. While there is vacillating, inconclusive, and sometimes deprecating testimony by Smith and others about the work performance of those employees, Smith and others also admitted that they had had no pre-May 17 intentions to discharge them; neither had these employees been warned or disciplined for alleged shortcomings. Even more significant, each was later called by supervisors Fleming or Radcliff who sought to induce them to return—clearly undermining any suggestion that Respondent found them so unfit that they would not have

<sup>46</sup> In these and some other cases under discussion there is the potential argument that even if Barnes had imposed only "lawful" terms, some of the alleged discriminatees might have refused to come to work anyway. This defense ignores conclusions under Sec. 8(a)(5) above that Barnes was not free to impose any unit-applicable terms on a unilateral basis as of May 17. In addition, it was Barnes' unlawful conduct that made it impossible to know whether employees were deterred from accepting his package because they did not like the flat-rate or other kinds of terms which he might lawfully impose if he were a "Spruce Up" successor, or whether employees were simply deterred by the plainly unlawful features of his package of overall terms, i.e., that the shop would be "nonunion" and that employees wanting jobs would have to reconcile themselves to that fact. As the Board said in *Spruce Up* supra at 197:

We believe we are entitled to resolve doubts against the wrongdoer. We cannot say with absolute certainty how many of the claimants would have accepted employment had [the successor employer] consented to recognize the Union and commence bargaining on that date. It seems reasonable to us that they might have

It is clear that they cherished that right to representation, and that Respondent's refusal to grant it was a significant motivating factor in their unwillingness to accept employment.

been retained even if they had not refused Barnes' unlawful terms.

The six remaining discriminatees were never offered jobs in the post-May 19 operation. Of them, *William Deetz*, *Marvin Wiggins*, and *Dan Burkhardt* were among those named by Smith as having been "ruled out" from further consideration by virtue of their declared refusals during May 17 interviews to accept Barnes' unlawful terms. Two of them (*Deetz* and *Wiggins*) credibly testified that each had been told before May 17 by supervisors that he would be retained after May 19. As their respective supervisors and Smith admitted, none of the three had been warned, disciplined, or otherwise singled out for removal before May 17, factors that are persuasive in concluding that Respondent failed under *Wright Line* to demonstrate that they would have been terminated even absent their privileged refusals to accept unlawful terms. But I do not believe that a *Wright Line* "mixed motive" analysis even applies to them. Smith admittedly "ruled them out" at a time when he had not otherwise made a determination as to who would stay on and thus failed to rehire them based on a single, unlawful, motive.

As to *Charles Kiesling*, *Mel Fosen*, and *David Lawson* (the last of the May 17 discriminatees), I conclude that Respondent failed in its *Wright Line* burden by failing to make a credible showing that there were plans before May 17 to terminate them or even to take action to correct the alleged shortcomings which they may have displayed. Indeed, as Smith admitted, describing the entire class of employees in the May 17 complement, some were better than others, but there was not "anything wrong" with any of them; they were all "good" employees.

As to *Fosen*, moreover, Respondent concedes (Br. at 64) that he "performed adequately." Respondent adds, however: "More importantly, Larry Smith testified that at the time of the sale there was no opening for Mr. *Fosen*."

If "no opening for Mr. *Fosen*" is Respondent's ultimate fall-back position, it may be treated summarily: If, arguendo, there was "no opening" it was for a number of reasons directly traceable to Barnes' unlawful behavior independently found elsewhere—most obviously in the failure to remain bound by the union contract and in the failure to notify and bargain in good faith with the Unions before implementing any of the wholesale changes imposed at and around the time of the asset transfer (including the "terminations" themselves). Barnes cannot credibly rely on any supposed May 17 doubts about bargaining unit needs (therefore "no opening") linked to picketing where he and *Coleman* had been anticipating (perhaps even counting on) for months the certainty of picketing by the Unions as soon as he showed his hand.

The General Counsel acknowledges on brief that there is credible evidence that bodyshop employee *Charles Kiesling* may be alcoholic. The record also shows that this information was known before May 17. Arguably, Barnes may have preferred to wait until the point when he (wrongly) believed he could ease out *Kiesling* without having to defend himself in a grievance proceeding. Respondent's burden under *Wright Line* requires more—a

demonstration that *Kiesling* would not have been part of the post-May 17 picture in any nondiscriminatory case. Specifically, Respondent failed to rebut the presumption that had Barnes continued to recognize the Unions and to honor the contract during the asset transfer period *Kiesling* would have remained. His ultimate future may have been in doubt, given this record, but Barnes' unlawful conduct has made it impossible to know what the processes of good faith collective bargaining might have produced in *Kiesling's* case.

There is this additionally to be said about Respondent's defense to *David Lawson's* nonhire: Respondent does not ultimately rely on any alleged shortcomings in *Lawson*; rather it rests on a claim (Br. 62) that *Lawson* was one of "numerous people" "who received" "job offers," but "who had stated they would not cross [the picket line]." This is not an attempt to carry Respondent's burden under *Wright Line*; it is simply a challenge to the conclusion above that, in the circumstances, Respondent could not lawfully insist, inter alia, that unit employees cross picket lines to keep their jobs after May 17. Respondent thus underscores what was a prima facie element in the General Counsel's case as to *David Lawson* and all other May 17 unit employees who were not permitted to stay on.

I conclude in summary that, in addition to being the victims of unilateral changes violating Section 8(a)(5), each employee in the unit on May 17 was independently the victim of discriminatory treatment violating Section 8(a)(3) of the Act.

On the foregoing analyses and on the whole record, I reach these ultimate

#### 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 Unions are, jointly and severally, labor organizations within the meaning of Section 2(5) of the Act.
3. At all times material including on and after May 17, 1982, the Unions have been the exclusive joint collective-bargaining representatives of Respondent's auto service, parts, and bodyshop employees in an appropriate collective-bargaining unit more specifically defined as the multi-employer collective-bargaining unit covered by the collective-bargaining agreement, which was admittedly honored, applied, and implemented by Respondent until on or about May 17.
4. By effectively succeeding to the operation of *Fremont Ford* in January 1982 (and in no case later than March 19, 1982), without significant change in the operation nor in the unit employee complement, Respondent then became bound to existing the collective-bargaining relationship with the Unions.
5. By admittedly honoring the existing collective-bargaining agreement and applying its terms for a substantial period to employees in the unit on and after the date of its succession found above Respondent assumed the obligations of that contract and became bound to it.
6. By the totality of acts below, and by each of them, Respondent has failed and refused to bargain collectively in good faith with the Unions as the exclusive represent-

ative of employees in the unit, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and, derivatively, Section 8(a)(1), of the Act.

(a) Failing to give the Unions adequate advance notice of Barnes' fixed intentions to engage in wholesale changes affecting terms and conditions of employment in the bargaining unit after the transfer of assets to Respondent, thereby frustrating the Unions' statutory right to bargain collectively about those intended changes.

(b) Affirmatively dispersing false and misleading information to the Unions and to unit employees regarding Barnes' plans for changes affecting the bargaining unit, including refusing to talk candidly with the Union's representative Bobo during a May 6, 1982 meeting and by falsely extending recognition and promising to "get back" to Bobo.

(c) Repudiating the union contract on May 17, 1982, and thereafter refusing to apply it to employees in the unit.

(d) Admittedly refusing in general to recognize the Unions as the unit employees' collective representative on and after May 17, as well as by the discrete acts of unilaterally imposing a flat-rate system and otherwise changing wages, hours of work, and other terms and conditions of employment prevailing until May 17 in the unit.

(e) By direct dealing with unit employees and bypassing the Unions by tendering to applicants on and after May 17 certain written "terms of employment."

7. By the totality of the acts below, and by each of them, Respondent has discriminated with respect to the hire, tenure, and other terms and conditions of employment of employees in order to discourage membership in and activities on behalf of the Unions, and thereby has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and, derivatively, Section 8(a)(1) of the Act:

(a) Terminating all 22 employees named in fn. 30, effective May 17, 1982, and requiring them to submit new written applications for continued employment.

(b) Requiring as a condition for consideration for reemployment in the bargaining unit after May 17 that employees affirmatively state their willingness to accept nonunion status, to sign individual employment contracts and to cross a picket line.

(c) Failing immediately to recall the 12 employees indicated in fn. 30 by the absence of asterisks.

(d) Imposing on all unit employees permitted to return on May 19 or hired thereafter the requirement that they sign individual employment contracts.

(e) Applying the terms set forth in those contracts rather than the terms in the existing labor agreement to all employees hired on and after May 19.

8. By the totality of the acts below, and by each of them, Respondent has independently interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

(a) Terminating employees of Fremont Ford other than those in the bargaining unit on May 17 and requir-

ing them to submit written applications for reemployment.

(b) Telling bargaining unit employees that Respondent's operation after May 17 would be nonunion, and that they must be willing to sign individual employment contracts and cross a picket line to keep or get a bargaining unit job.

#### THE REMEDY

The foregoing analysis and ultimate conclusions of law show that this is a case involving fundamental violations susceptible of various legal characterizations. The violations have in common, however, that they involved a trampling on bargaining unit employees' rights to the various statutory protections generally referred to by the Court in *Wiley*, supra, as providing "protection . . . from a sudden change in the employment relationship." Whether analyzed as 8(a)(5), (3), or (1) violations, the actions of Barnes in first hiding his unlawful plans from the employees and from their union representatives and then implementing them with unit-shaking consequences require the customary and presumptively appropriate remedy; the reestablishment of the status quo ante the central violations which occurred on May 17, 1982.

It is not only most appropriate to reestablish the conditions and employment complement ante May 17; it is virtually impossible to envision how anything short would suffice to prevent Respondent from deriving advantage from the May 17 blitz and its aftermath. Where it has been concluded that Respondent assumed the existing labor agreement and became bound to it before May 17, Respondent must reinstate that agreement as the governing instrument and apply the same to all unit employees, retroactive to May 17. To the extent that the agreement requires contributions to pension trusts, these trusts must be made whole for any lapses due to Respondent's May 17 repudiation of the labor agreement and underlying labor relationship. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).<sup>47</sup>

Most importantly, to reestablish conditions ante May 17 Respondent must offer reinstatement to their pre-May 17 jobs to all 22 unit employees terminated effective May 17, without prejudice to their seniority or other rights and privileges established *per* the labor agreement or otherwise, discharging, if necessary to make room for them, any "outside" employees hired after May 17, and make those 22 employees whole in the manner generally provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

I also provide in my recommended Order for "broad" cease-and-desist language, Respondent's unlawful conduct having been blatant, pervasive, and destructive of fundamental employee rights.<sup>48</sup>

<sup>47</sup> Whether that agreement automatically renewed itself after its stated expiration date, or whether a successor agreement bound Respondent, are matters for the compliance stage. The pertinent facts were not litigated herein.

<sup>48</sup> Cf. *Hickmott Foods*, 242 NLRB 1357 (1979)

Finally, I provide for posting of appropriate remedial notices in a manner ensuring that the nonunit employees incidentally harassed with pro forma terminations and

reapplication requirements will be assured against future victimization.

[Recommended Order omitted from publication.]