Jamestown Fabricated Steel and Supply, Inc. *and* Shopmen's Local Union No. 470 of the International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers. Case 03–CA–119345

August 4, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND MCFERRAN

On November 6, 2014, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions and a supporting brief, to which the General Counsel filed an answering brief and the Respondent filed a reply brief. The General Counsel filed limited cross-exceptions and a supporting brief, to which the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by refusing to recognize and bargain with the Union, we find that the Respondent was on notice of the contents of the Union's written demand for recognition on December 19, 2013, when Union Representative Harry Ehrie hand-delivered the written demand to Supervisor Malachi Ives, and not later as found by the judge. We further find that the Respondent was precluded from refusing to recognize and bargain with the Union by operation of the successor bar. See *UGL-UNICCO Service Co.*, 357 NLRB 801, 808 (2011) (once a successor's obligation to bargain with the Union attaches, "the union is entitled to a reasonable period of bargaining, during which time no question concerning representation that challenges its majority status may be raised . . . nor, during this period, may the employer unilaterally withdraw recognition from the union based on a claimed loss of majority support, whether arising *before or during* the period") (emphasis added). For this reason, we find it unnecessary to address the judge's findings that the demand for recognition was timely and that the employees' expressions of disaffection were tainted. See *Crown Textile Co.*, 335 NLRB 201, 202 (2001) ("The successor-bar doctrine . . . applies regardless of whether a decertification effort by employees is initiated before or after the union has made a formal demand for recognition from the successor.").

Our concurring colleague would reject the successor bar and return to *MV Transportation*, 337 NLRB 770 (2002). We note that no party has argued that the Board should modify or overrule *UGL-UNICCO* in this case. Contrary to our concurring colleague, and for the reasons stated in *FJC Security Services, Inc.*, 360 NLRB 1052, 1052 (2014), we see no basis for departing from the successor bar doctrine articulated in *UGL-UNICCO*.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violation found. We shall substitute a new notice to conform to the Order as modified.

AMENDED REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order the Respondent to cease and desist from engaging in such conduct and, as explained in the remedy section of the judge's decision, to take certain steps to effectuate the policies of the Act.

For the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful refusal to recognize and bargain with the Union. We adhere to the view that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, supra at 738, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act."

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, supra, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's refusal to recognize and bargain with the Union. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. Eliminating this incentive is particularly necessary here, where the Respondent expressed to employees its intention that the Jamestown facility would be "nonunion." It also ensures that the Union will not be pressured by the possibility of a decertification petition or by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's violation because it would permit a decertification petition to be filed before the employees have had a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unjust in circumstances such as those here, where the Respondent's refusal to recognize and bargain with the Union would likely have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation. In order to provide employees with the opportunity to fairly assess for themselves the Union's effectiveness as a bargaining representative, the bargaining order requires the Respondent to bargain with the Union for a reasonable period of time.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Jamestown Fabricated Steel and Supply, Inc., Jamestown, New York, its officers, agents, successors, and assigns shall take the actions set in the Order as modified.

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

"(a) Failing and refusing to bargain with Shopmen's Local No. 470 of the International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit."

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

"(a) Recognize and, on request, bargain with the Union 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. The appropriate unit is as follows:

> All production and maintenance employees employed by Jamestown Fabricated Steel and Supply, Inc. at its Jamestown, New York, facility; but excluding all office clerical employees, draftsmen, engineering employees, watchmen, guards, and supervisors."

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

MEMBER JOHNSON, concurring.

I concur with my colleagues in finding that, under extant law set forth in *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union, and that an affirmative bargaining order is appropriate to remedy this violation. However, I write separately to express my view that *UGL-UNICCO* was wrongly decided. The facts of this case graphically illustrate the error of that decision and the need to reconsider it when the issue is directly raised by a party in some future case.

As more fully set forth in the judge's decision, on November 6, 2013,[1] the Respondent purchased the assets of Jamestown Fabricated Steel, Inc. (JFS). At the time of the sale, the Union represented a unit of four of JFS's production and maintenance employees. Thereafter, the Respondent hired two former JFS unit employees, Travis Tkach and Devin Marsh. During the relevant time period, Tkach and Marsh were the Respondent's only two production employees.

On December 19, Harry Ehrie, a union representative, went to the Respondent's facility to hand deliver the Union's demand for recognition and bargaining. When Ehrie arrived, he went into the shop to speak with Tkach and Marsh. After identifying himself as a union representative, Ehrie asked Tkach and Marsh some questions and then gave each of them his business card before leaving. Ehrie subsequently told Malachi Ives, the Respondent's supervisor and part owner, that he was delivering the Union's demand for recognition and handed Ives a sealed envelope. After their conversation, Ives went to his office. Tkach and Marsh entered Ives' office as he was opening the envelope from Ehrie. Tkach gave Ives the business card that Ehrie had given him and said, "You might want this, because I don't." Tkach also stat-

[1] All dates are in 2013, unless otherwise noted.

ed, "Fuck the Union. All they ever did was take money out of my paycheck every month. The only time they would come around was during negotiations or election time." Tkach added, "Why would I want to go back to the Union making less money, because I'm making more money now." Marsh expressed similar sentiments, stating that the Union would take their money for union dues and did not check on what the employees needed until it was time to negotiate a new contract. Marsh added that the Union just came in for "their votes." Ives testified that, in light of the statements by Tkach and Marsh, the Respondent decided not to recognize the Union because it did not want to disregard its employees' sentiments regarding representation.

In concluding that the Respondent violated the Act, my colleagues rely on *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), where the Board majority overruled *MV Transportation*, 337 NLRB 770 (2002), and reinstated the "successor bar" doctrine. In so doing, the Board replaced the extant rebuttable presumption of an incumbent union's majority status in favor of an irrebuttable presumption that could last a year, or more. The result is that employees cannot petition to decertify the incumbent union or to be represented by another union, and the successor employer cannot refuse to recognize or withdraw recognition regardless of facts indicating that the union no longer maintains majority status or support.

For reasons stated by dissenting Member Hayes in *UGL-UNICCO*, supra, slip op. at 10–13, and more recently by dissenting Member Miscimarra in *FJC Security Services, Inc.*, 360 NLRB 929, 929–932 (2014), I disagree with the Board's decision to overrule the balanced, well-reasoned standard established in *MV Transportation*, where the Board held that "an incumbent union in a successorship situation is entitled to—and only to—a rebuttable presumption of continuing majority status, which will not serve as a bar to an otherwise valid decertification . . . or other valid challenge to the union's majority status." 337 NLRB at 770.

Applying *UGL-UNICCO* here, the Respondent is foreclosed from refusing recognition of the Union based on the Union's actual loss of majority status. See *Levitz Furniture Co.*, 333 NLRB 717, 725 (2001) (an employer may rebut the presumption of an incumbent union's majority status only on a showing of actual loss of majority). In my view, this result offends the Section 7 rights of employees. In this regard, I note that the Respondent received proof of the actual loss of majority support for the Union almost immediately after receiving the Union's bargaining demand. As Ives was opening the envelope containing the Union's demand for recognition, the Respondent's only two employees, Tkach and Marsh, both made statements to Ives that more than sufficed as objective evidence of their adamant opposition to representation by the Union's support. The facts of this case, where the only two bargaining unit employees unequivocally disclaimed support for representation by the Union within moments of its demand for recognition, underscore the inequity of applying the successor bar doctrine reinstituted in *UGL-UNICCO* to foreclose for an extended period employees' exercise of the Section 7 right of free choice on the fundamental question of collective-bargaining representation.

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with Shopmen's Local No. 470 of the International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL recognize and, on request, bargain collectively and in good faith with the Union as the exclusive representative of our 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. The appropriate unit is as follows:

All production and maintenance employees employed by Jamestown Fabricated Steel and Supply, Inc. at its Jamestown, New York, facility; but excluding all office clerical employees, draftsmen, engineering employees, watchmen, guards, and supervisors.

JAMESTOWN FABRICATED STEEL AND SUPPLY, INC.

The Board's decision can be found at www.nlrb.gov/case/03-CA-119345 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Jesse Feuerstein and *Alicia Pender, Esqs.*, for the General Counsel.
James Grasso, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Buffalo, New York, on June 9, 2014. Shopmen's Local Union No. 470 of the International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers (the Union or Local 470) filed the charge on December 19, 2013,[1] and the General Counsel issued the complaint on March 24, 2014.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in structural steel fabrication at its facility in Jamestown, New York. Based on a projection of its operations since about November 6, 2013, at which time the Respondent commenced operations, the Respondent will annually sell and ship from its Jamestown, New York facility goods valued in excess of $50,000 directly to points outside the State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that the Respondent is a successor to Jamestown Fabricated Steel, Inc. (JFS). The complaint further alleges that since December 19, 2013, the Respondent has violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union as the collective-bargaining representative of its employees.

Facts

Background

For a number of years, JFS operated a steel fabrication facility at 1034 Allen Street in Jamestown, New York, where it produced structural steel products including beams, stairs and railings. JFS was owned by Ron White, who was its president, and Lee Luce.

Since at least 2000, the Union represented a unit of production and maintenance workers employed by JFS at its Jamestown, New York facility. The most recent collective-bargaining agreement between the Union and JFS was effective by its terms from May 1, 2010, through April 30, 2012, and was extended by mutual agreement through June 30, 2013. In 2013, JFS employed four bargaining unit employees, David Spitzer, Jeff White, Devan Marsh, and Travis Tkach. Spitzer was the union steward.

In performing fabrication work at the JFS facility, the employees utilized plate shears, bending brakes, drill presses, welders, torches, and band saws. The customers of JFS were primarily general contractors and individuals, such as farmers and "do-it-yourselfers" who ordered a specialized product. All of the customers were located in the Jamestown, New York area. At times, unit employees made deliveries using a company vehicle while, on occasion, a nonunit truckdriver would be hired to make a delivery. Many customers would take delivery of a manufactured item at the shop and transport it themselves.

In February 2013, Spitzer informed Anthony Rosaci, a general organizer for the International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers (the International Union), that Spitzer had heard a rumor that JFS was closing. On February 27, Rosaci sent a letter to White indicating that the Union understood that JFS was planning to cease operations and asking a series of questions regarding its future plans. After Rosaci did not receive a response to that letter, on March 4, he sent another letter requesting a response to the questions he had raised in his February 27 letter. Again, the Union received no response

On March 15, Rosaci sent another letter to White requesting a response to his previous questions and offering to meet to discuss the impact on employees of the cessation of operations by JSF. On March 26, 2013, Edward Wright, an attorney for JFS, sent a letter to Rosaci indicating that JFS would cease operations on April 30, 2013. This letter also responded to the Union's previous request for information.

[1] All dates are in 2013, unless otherwise indicated.

On April 15, the Union and JFS agreed to extend the collective-bargaining agreement through June 30. On April 30, 2013, JFS closed its facility and laid off its employees.

On June 17, the Union requested an update on the status of JFS. On that same date, Wright replied by a letter indicating that there had been no change in status. The letter further indicated that the JFS had ceased operations as planned on April 30, 2013, and intended to sell the real and personal property "as is" and "where it is."

In August 2013, White contacted Tkach and asked him if he would be willing to meet the potential owners of the JFS facility, Mel and Kyle Duggan, the owners of Duggan & Duggan, a general contractor and a former customer of JFS. Tkach told White he would be willing to meet with them and thereafter a meeting was held between the four individuals at the Allen Street facility in Jamestown. The Duggans informed Tkach that the new company would use the same equipment that had been used by JFS and asked him if he would be willing to help get the facility cleaned up and operating. Tkach indicated he would be willing to do so. There was no discussion about the Union at this meeting.

The Respondent Begins Operations

On November 6, 2013, the assets of JFS were sold to the Respondent, which is owned by the Duggans and Malachi Ives, who has a 15 percent share. Shortly thereafter, the Duggans and Ives met with Tkach at the Allen Street facility. Ives told Tkach that he owned 15 percent of the Respondent and that he would be the day-to-day supervisor of the operation. Ives offered Tkach a job with the Respondent at $16 an hour, which was $2.50 more than what Tkach earned at JFS. According to Tkach's credited testimony, Ives also informed Tkach that the new operation would be a "nonunion shop."[2] The Respondent began operation on November 12, 2013, with two employees, Tkach and Mike Barry. Barry had not been employed by JFS.

At the end of October 2013, Tkach sent a text message to former JFS employee Devan Marsh and informed him that the business was going to be sold and encouraged him to send an application to Ives at Duggan & Duggan. Marsh had another job and did not apply for a job with the Respondent at that time. In late November or early December 2013, Marsh changed his mind and submitted a resume to the Respondent. Ives contacted Marsh and arranged an interview with him at the Allen Street facility in mid-December. At the interview, Ives asked Marsh if he knew how to operate the machinery that was in the shop and Marsh replied that he did because he had operated all of that equipment while working for JFS. Ives asked Marsh what he earned at JFS and Marsh replied that he had earned $10.30 an hour. Ives said that he would start Marsh at $11 per hour. Ives told Marsh that before he hired him, he needed to finalize Barry's termination.[3] Shortly after the interview, Ives offered Marsh a job and he accepted. Marsh began working for the Respondent in mid-December 2013. Marsh and Tkach were the only two production employees at that time. At the time of the hearing they remained the only two production employees.

The Respondent fabricates the same products that were made by JFS and uses the same equipment that was in the Allen Street facility when it was operated by JFS. The Respondent's production employees perform the same work that unit employees performed for JFS, including the fabrication of steel, welding, and painting. The hours of work for the Respondent's employees are similar to the hours they worked at JFS. The Respondent's customers are the same as those of JFS.

On November 12, 2013, Harry Ehrie, a representative of the International Union, was going to Jamestown on another matter when Rosaciasked him to stop by the JFS facility to see if there was any production going on, or whether JFS was selling off any of its equipment. When Ehrie arrived, Ives came out and spoke to him. Ehrie told Ives he was an ironworker but did not identify himself as a union representative. Ives stated that he was the new owner of the facility and that they had just begun operations. Ehrie then left the premises and called Rosaci, who requested that he go back and obtain as much information as possible about the new operation. Ehrie returned but Ives was no longer there. Ehrie spoke to White who stated that Ives was the owner of the new company. Ehrie asked White what the name of the new company was and White replied that it was Jamestown Fabricated Steel and Supply.

On November 22, 2013, Rosaci sent a letter to White requesting an update on the status of JFS. On December 3, Wright replied by a letter indicating, for the first time, that JFS had been sold to the Respondent on November 8, 2013.

The Union's Demand for Recognition and Bargaining

On December 18, Spitzer called Rosaci and informed him that he stopped by the Respondent's facility and saw Tkach and Marsh working there and that they were using the same equipment and doing the same work as when JFS operated the facility. After speaking to Spitzer, Rosaci called Local 470 and asked if they would have one of their members stop by and ask for a business card with the new owner or the manager's name on it, as Rosaci did not have that information. Local 470 obtained a business card which they transmitted to Rosaci. Rosaci then contacted Ehrie and told him that he was going to draft a letter demanding recognition that he would send to Ehrie. Rosaci instructed Ehrie to hand deliver the letter the next day. He also asked Ehrie to contact him immediately after the letter was delivered and stated that he would then also fax the letter to the Respondent.

The letter signed by Rosaci (GC Exh. 18) set forth the following:

> Mr. Malachi Ives
> Jamestown Fabricated Steel & Supply, Inc./JFSS, LLC
> 1034 Allen St.
> Jamestown, NY 14701
> BY HANDDecember 19, 2013
>
> RE: Shopmen's Local Union No. 470

[2] Tkach testified pursuant to a subpoena from the General Counsel. I found him to be a credible witness, his testimony was detailed and his demeanor reflected certainty with regard to the matters that he testified to. In addition, Tkach's testimony on this point is uncontradicted. In this regard, Ives testified that he had no disagreement with Tkach's testimony regarding this meeting (Tr. 141).

[3] Barry was terminated on December 6, 2013.

> Dear Mr. Ives:
>
> Shopmen's Local Union No. 470 represents your shop employees and your Company is hereby requested to recognize Shopmen's Local Union No. 470 as the exclusive representative and agent of the production and maintenance employees.
>
> You are hereby requested to enter into negotiations with representatives of this Union for the purpose of consummating a mutually satisfactory collective-bargaining agreement covering the Company's aforementioned employees. Kindly inform the undersigned as to whether your Company will recognize the Union and bargain.
>
> The Union further insists that there cannot be any change made with respect to the employment status, terms and conditions of any bargaining unit employee except by mutual agreement with this Union.
>
> Sincerely,
>
> Anthony J. Rosaci
> General Organizer

After obtaining the above-noted demand for recognition and bargaining from Rosaci on the evening of December 18, Ehrie made a copy of it and placed it in an envelope. On December 19, Ehrie took the demand for recognition and bargaining to the Respondent's facility in Jamestown. When Ehrie arrived there in the late morning he went into the office area but nobody was there. Ehrie then went into the shop area and spoke to Tkach and Marsh. Ehrie introduced himself and said that he was going to hand deliver to Ives a letter requesting recognition on behalf of the Union as the representative of the employees. Ehrie gave both employees his business card and wrote Rosaci's name and phone number on the back. He told the employees that Rosaci had asked that the employees call him and he would give them further information about the Union's position. Ehrie then asked the employees what they were getting paid. Tkach replied that they had been told in the office not to say anything. When Ehrie asked whether they had health care and a pension plan, Tkach told Ehrie that he would have to ask in the office. Marsh did not respond to any of the questions asked by Ehrie. Ehrie asked the employees for their contact information but they did not give it to him. Ehrie then left and went to another facility in Jamestown.

After approximately 20 minutes, Ehrie returned to the Respondent's facility. When he arrived, Ives was just getting out of his vehicle in the parking lot. Ehrie approached Ives and introduced himself. Ehrie told Ives that he was hand delivering a letter of recognition from the Union and then gave Ives the envelope containing the Union's demand for recognition and bargaining. According to Ehrie's credited testimony, Ives replied that he was "not going union."[4] Ehrie and Ives briefly discussed the employees' wages and Ehrie asked him about employee health care and a pension. Ives replied that as business improved, the Respondent would look into those issues. Ehrie testified that during their conversation, Ives did not open the envelope containing the Union's demand for recognition and bargaining.

After Ehrie left the Respondent's facility, he called Rosaci and informed him that he had hand delivered the demand for recognition and bargaining to Ives. Immediately thereafter, at 11:39 a.m. Rosaci faxed the identical letter demanding recognition and bargaining to the Respondent that is noted above, except that it did not contain the reference to hand delivery. (GC Exh. 16.)

After Ehrie left the facility, Ives went to his office. As Ives was opening the envelope containing the Union's demand for recognition and bargaining, Tkach and Marsh came into his office. Tkach gave Ives the business card that Ehrie had given him and said, "You might want this, because I don't." Tkach also stated, "Fuck the Union. All they ever did was take money out of my paycheck every month. The only time they would come around was during negotiations or election time." Tkach added, "Why would I want to go back to the Union making less money, because I'm making more money now."

After Tkach had given Ives Ehrie's business card, Marsh gave Ives the business card that Ehrie had given him. Ives asked Marsh what Ehrie had spoken to them about. Marsh replied that he told Ehrie that he did not have time to talk to him and that Tkach told Ehrie that any questions should be directed to Ives. Ives then told the employees that if there were any more visitors, they should send them in to see him. Marsh then told Ives that the Union would take their money for union dues and never come around to check on what employees needed until contract time. Marsh added that the Union just came in for "their votes." At the trial, both Tkach and Marsh testified that this was the first time that either of them had expressed to Ives their feelings regarding the Union.

On March 4, 2014, pursuant to a request from Rosaci, Ehrie returned to the Respondent's facility to see if Marsh or Tkach were interested in speaking to the Union. When Ehrie arrived at the facility he walked into the office. When Ives saw Ehrie, he told him that he had nothing to say. As Ehrie walked out of the facility he saw Marsh but did not speak with him.

There has been no further contact between the Union and the Respondent since March 4, 2014. Ives testified that because of the statements made to him by Tkach and Marsh regarding the Union, the Respondent decided not to recognize the Union because the Respondent did not want to act in a way contrary to their desires.

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[4] There is little variance between the testimony of Ehrie and Ives regarding the probative aspects of their brief meeting. However, Ives testified that after Ehrie handed him the envelope containing the demand for recognition and bargaining, Ives replied that "he was not a big union guy." To the extent the testimony of Ehrie and Ives conflicts on this point, I credit Ehrie. Immediately after the meeting, Ehrie wrote notes regarding the meeting. (GC Exh. 19.) Ehrie's contemporaneous notes indicate that after Ehrie handed Ives the Union's demand for recognition and bargaining, Ives replied that he "was not interested in being union." Since Ehrie's trial testimony is substantially corroborated by his contemporaneous notes and because he appeared to have a more distinct recollection of this meeting, I find this testimony to be the more reliable version of what was said.

The Contentions of the Parties

The General Counsel contends that the Respondent is a successor to JFS and that the Union made a valid demand for recognition which the Respondent has refused. The General Counsel further argues that any evidence of employee disaffection with the Union became known only after the Respondent's bargaining obligation attached. In light of that, the General Counsel asserts that the Respondent is precluded on relying on evidence of disaffection pursuant pursuant to the Board's "successor bar" doctrine that was restored in *UGL-UNICCO Service Co*., 357 NLRB 801 (2011). The General Counsel also contends that the evidence regarding employee disaffection was tainted by Ives' statement that he intended to operate a nonunion shop and therefore the Respondent was not privileged to rely on such statements as a basis for its refusal to recognize and bargain with the Union. Accordingly, the General Counsel contends that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

The Respondent contends that at the time it obtained a substantial and representative complement of employees and began operations, a majority of those employees had not been employees of JFS. Its primary argument, however, is that the Union's oral demand for recognition on December 19, 2013, was insufficient to establish an obligation to recognize and bargain with the Union. The Respondent further contends that by the time it became aware of the Union's written demand for recognition and bargaining, pursuant to *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998), it had a good-faith reasonable belief of the Union's lack of majority support based on the expressions of disaffection regarding the Union made by Tkach and Marsh. The Respondent therefore contends that it is privileged to refused to acquiesce in the Union's request for recognition and bargaining.

Analysis

It is clear that the Respondent is a successor to JFS under the standards applied by the Board. In *Van Lear Equipment, Inc*., 336 NLRB 1059, 1063 (2001), the Board, citing its decision in *Hydrolines, Inc*., 305 NLRB 416, 421 (1991), summarized the test for determining successorship as follows:

> An employer, generally, succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a "substantial and representative complement," in an appropriate bargaining unit are former employees of a predecessor and the similarities between the two operations manifest a 'substantial continuity' between the enterprises. *Fall River Dyeing Corp v. NLRB*, 482 U.S. 27, 41–43 (1987), citing, inter alia, *NLRB v. Burns Security Services*, 406 U.S. 272, 280 fn. 4 (1972)

With respect to the issue of substantial continuity between a predecessor and successor, in *Fall River Dyeing Corp.*, supra, the Supreme Court identified the following factors as relevant:

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products and has basically the same body of customers.

In determining whether there is substantial continuity between the two enterprises the Board considers the "totality of the circumstances." *N.K. Parker Transport*, 332 NLRB 547, 550 (2000).

In the instant case, the Respondent's production process is almost identical to that of JFS. In this regard the Respondent produces the same fabricated steel products and uses the same equipment as JFS. The production process is unchanged and therefore the employees perform the same work in the same manner as they did for JFS. Finally, the Respondent has the same customers as JFS. The fact that the Respondent began operations more than 6 months after the closure of the JFS facility does not detract from the fact that there was substantial continuity between the two entities. In *Tree-Free Fiber Co*., 328 NLRB 389 (1999), the Board held that there was substantial continuity between two enterprises when there was a hiatus of 16 months between the closure of the predecessor and the commencement of operations by the successor. With respect to supervision, the Respondent's employees are supervised by Ives and when they worked for JFS, the supervision was carried out by one of the two owners. Thus, while the supervisors are different individuals, supervision by the Respondent is performed in the same manner as it was at JFS. Based on the foregoing, I find that the Respondent is the successor to JFS.

The Respondent contends that at the time it obtained a substantial and representative complement of employees, a majority of those employees had not been represented by the Union at the predecessor. I note that when the Respondent initially began operations on November 12, only one of its two production employees had been formerly employed by JFS and represented by the Union but, by mid-December, both of the Respondent's production employees had been previously employed by JFS and represented by the Union. Thus, within a month of its commencement of operations, and prior to the Union's request for recognition, the Respondent's work force was composed of two employees, Tkach and Marsh, both of which had been previously represented by the Union at JFS. Since, at the time of the hearing, the Respondent continued to employ two production employees, it is clear that two employees constituted a substantial and representative complement of its employees. I find that the critical time for considering whether a majority of the current employees had been formerly represented by a union is at the time that a union demands recognition and bargaining. Prior to such a request being made, an employer has no obligation to recognize and bargain with a union, regardless of whether or not its work force is composed of a majority of employees who were formerly represented by a union at its predecessor.

I note, in this regard, that in *Hampton Lumber Mills-Washington*, 334 NLRB 195 (2001), the Board held:

> A successor employer's obligation to recognize the union attaches after the occurrence of two events: (1) a demand for recognition or bargaining by the union; and (2) the employment by the employer of a "substantial and representative

complement" of employees, a majority of whom were employed by the predecessor.

The Board has further held that these two conditions need not occur in a particular order. *Cadillac Asphalt Paving Co*., 349 NLRB 6, 9 (2007); *MSK Corp*., 341 NLRB 43, 44 (2004). Accordingly, I find that when the Union demanded recognition and bargaining on December 19, the Respondent had hired a substantial and representative complement of employees, a majority of whom had been previously represented by the Union.

As noted above, however, the Respondent argues that the Union's oral demand for recognition made by Ehrie on December 19, was not a valid demand for recognition and bargaining and therefore it is not obligated to honor it. In support of its position, the Respondent relies on *Sheboygan Sausage Co*., 156 NLRB 1490, 1500–1501 (1966), and three decisions of the D.C. Circuit Court of Appeals, *Williams Enterprises v. NLRB*, 956 F.2d 1226 (D.C. Cir. 1992); *AT Systems West, Inc. v. NLRB*, 294 F.3d 136, 139 (D.C. Cir. 2002), and *Prime Service, Inc. v. NLRB*, 266 F.3d 1233, 1238 (D.C. Cir. 2001).

As set forth in detail above, when Ehrie gave Ives the envelope containing the Union's written request for recognition and bargaining, Ehrie told Ives that the Union was making a demand for recognition.

The Board has found that an oral request is sufficient to constitute a valid demand for recognition and bargaining. *Cadillac Asphalt Paving Co*., supra at 10. I note that in *Hampton Lumber Mills-Washington*, the Board held that an employer who has hired a substantial and representative complement of employees, a majority of whom were represented by a union at the predecessor, was obligated to recognize the union after "a demand for recognition or bargaining by the union." Id. at 195. In my view, the Board's language clearly indicates that either a demand for recognition or bargaining is sufficient to trigger a bargaining obligation in a successorship situation. In *Hampton Mills-Washington*, the union's letter, which was found sufficient to establish a bargaining obligation on behalf of the successor employer, requested recognition and did not specifically request bargaining. Id. at 199. Accordingly, I find that, in the instant case, Ehrie's oral request for recognition, coming as it did after the Respondent had hired a substantial and representative complement of its employees from the predecessor's work force, which had been represented by the Union, constituted a valid request for recognition sufficient to establish an obligation to recognize and bargain with the Union. In making this finding, I note that since the Respondent's two production employees were performing the same work, with the same equipment, and in the same manner as the predecessor, the Union requested recognition in the historical and appropriate unit of production and maintenance employees.

To the extent that, after the Board's decision in *Hampton Mills-Washington*, *Sheboygan Sausage Co*., supra, has any continuing viability, I find it to be distinguishable. In that case, the union sent a telegram to the employer requesting recognition on the basis of majority support demonstrated by authorization cards. The Board found that the telegram was insufficient to trigger an obligation to bargain on behalf of the employer because it did not specifically request bargaining or propose dates and times for a bargaining session. The Board found this to be of particular significance because of the fact that the union was also collecting authorization cards in order to obtain a Board conducted election. The instant case involves a successor situation, rather than an initial organizing campaign where, along with a demand for recognition, authorization cards were being solicited for the purposes of obtaining a Board-conducted election. Obviously, in a successor situation such as the instant case, the employees working for the successor have a history of representation by the union requesting recognition. Thus, it would appear that there is not the same necessity for the union to be so precise and specifically request bargaining in addition to requesting recognition.

With respect to the Respondent's reliance on the above-noted decisions of the D.C. Circuit, with all due respect to the circuit court, I am obligated to follow Board precedent unless and until it is reversed by the Supreme Court. *Pathmark Stores, Inc*., 342 NLRB 378 fn. 1 (2004); *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984).

At the time that the Union made its oral demand for recognition on December 19, the Respondent had not yet been apprised of any disaffection for the Union by its two production employees. That did not occur until shortly afterwards, when Ives returned to his office and was opening the envelope containing the Union's written request for recognition and bargaining. Thus, because the Respondent did not have any evidence reflecting a lack of support for the Union from its two production employees prior to the Union's valid oral demand for recognition on December 19, I find that it did not have a good-faith, reasonable doubt that the Union lacked majority status at the time of the Union's demand for recognition. Accordingly, I find *Allentown Mack Sales & Service* ,supra, to be distinguishable. In *Allentown Mack*, the respondent had purchased the assets of a predecessor employer on December 20, 1990. During the period before and immediately after the sale, a number of employees made statements to the new owners of the facility suggesting that the incumbent union had lost support among employees in the bargaining unit. The union requested recognition from the respondent on January 2, 1991. The Supreme Court found that the statements made by employees prior to the union's demand for recognition established that the respondent had a good-faith, reasonable doubt regarding the union's majority status at the time the union demanded recognition.

Since, in the instant case, the Responded did not obtain evidence regarding employee disaffection for the Union until shortly after it made a valid demand for recognition, I find that the Board's decision in *UGL-UNICCO Service Co*., 357 NLRB 801 (2011), to be applicable. In *UGL-UNICCO*, the Board overruled its decision in *MV Transportation*, 337 NLRB 770 (2002), and restored the "successor bar" doctrine that had originally been established in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). The Board held in *UGL-UNICCO* that an incumbent union is entitled to a "reasonable period of bargaining" during which no question concerning representation that challenged its majority status may be raised through a petition for an election filed by employees, by the employer, or by a union. In addition, during this period an employer may not unilaterally

withdraw recognition from the Union based on a claimed loss of majority support. Id., at 348.

In reestablishing the successor bar doctrine, In *UGL-UNNICO*, slip op. at 803, the Board noted the following observation by the Supreme Court set forth in *Fall River Dyeing Corp.*:

> [A]fter being hired by a new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. In fact, they may be inclined to shun support for their former union, especially if they believe that such support would jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff or problems associated with it. Without the presumption of majority support and with a wide variety of corporate transformations possible, an employer could use a successor enterpriseas a way of getting rid of a labor contract and exploiting the employees hesitant attitudes toward the union to eliminate its continuing presence. [Id. at 40.]

Applying the successor bar doctrine to the instant case, once the Respondent's obligation to recognize and bargain with the Union matured on December 19, 2013, based on Ehrie's oral demand for recognition, the Union was entitled to a reasonable period of time of bargaining without challenge to its majority status. Of course, the Respondent has refused to recognize and bargain with the Union entirely and consequently no bargaining has occurred at all between the parties. Thus, the expressions of disaffection made by Tkach and Marsh shortly after the Union's demand for recognition was made cannot serve as a basis for the Respondent's refusal to recognize and bargain with the Union. On the basis of the foregoing, I find that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union since December, 19, 2013.

Even if I were to find that Ehrie's demand for recognition on December 19, 2013, was not a valid demand for recognition, I would still find that the Respondent violated Section 8(a)(5) and (1) of the Act by its refusal to recognize and bargain with the Union. On the same day, as the oral demand for recognition, the Respondent received the Union's letter requesting recognition and bargaining, by both hand delivery and by fax. Even under the rationale of the cases relied on by the Respondent, there is no question that the written request for recognition and bargaining is valid. In this respect, the letter requests not only recognition and bargaining but also requests the Respondent to inform the Union of its intentions.

The evidence establishes that the Respondent did not have knowledge of the Union's written demand for recognition and bargaining until after Tkach and Marsh had made statements suggesting that they no longer supported the Union. As noted above, however, when Ives met with Tkach and confirmed his hiring, shortly before the Respondent began operations on November 12, Ives told Tkach that the Respondent's operation would be "nonunion."

In *Advanced Stretchforming International, Inc.*, 323 NLRB 529, 530 (1997), the Board indicated that "A statement to employees that there will be no union at the successor employer's facility plainly coerces employees in the exercise of their Section 7 right to bargain collectively through representatives of their own choosing and constitutes a facially unlawful condition of employment." In so finding, the Board indicated that, as noted above, during the time of transition between a predecessor and successor employer, a union is in a particularly vulnerable position and employees might be inclined to shun support for their former union, especially if they believe that such support would jeopardize their jobs with the successor. Thus, when Ives coercively told Tkach that the Respondent's operation would be "nonunion" shortly before the Respondent began operations, I find that Ives' statement tainted Tkach's expression of disaffection for the Union that he made on December 19. I also find that it is reasonable to infer that Tkach relayed to Marsh the coercive statement made by Ives that the new facility would be "nonunion." The basis for such an inference is that Tkach encouraged Marsh to apply for a job with the Respondent. I find it hard to believe that he would have done so without passing along the Respondent's stated position with regard to union representation of the employees it hired. Consequently, I find that the Respondent is not entitled to rely on the expressions of disaffection regarding the Union made by Tkach and Marsh on December 19 as they were tainted by Ives'coercive proclamation that the Respondent would be "nonunion."[5] Accordingly, I also find, on this alternative basis, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union since December 19, 2013.

CONCLUSIONS OF LAW

1. The Respondent is the successor to Jamestown Fabricated Steel and Supply, Inc.

2. Since December 19, 2013, Shopmen's Local Union No. 470 of the International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers (the Union) has been the exclusive bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees employed by Jamestown Fabricated Steel and Supply, Inc. (the Respondent) at its Jamestown, New York, facility; but excluding, all office clerical employees, draftsmen, engineering employees, watchmen, guards, and supervisors.

3. By refusing to recognize and bargain with the Union since December 19, 2013, the Respondent has violated Section 8(a)(5) and (1) of the Act.

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

[5] There is no allegation in the complaint that Ives' November 2013 statement violated Sec. 8(a)(1) of the Act. Consequently, I do not make any findings or conclusions as to whether the statement constituted a separate unfair labor practice. I note the complaint also does not allege that by making this statement, the Respondent lost its right to unilaterally set the initial terms and conditions of employment of its employees under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and thus violated Section 8(a)(5) and (1) of the Act by unilaterally changing wages and benefits when it commenced operations. Therefore, I make no findings or conclusions regarding this issue.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act, I order the Respondent to recognize and bargain in good faith with the Union and, if an understanding is reached, to embody such understanding in a collective-bargaining agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Jamestown Fabricated Steel and Supply, Inc., Jamestown, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union.

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

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

(a) On request, recognize and bargain with the Union 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. The appropriate unit is as follows

All production and maintenance employees employed by Jamestown Fabricated Steel and Supply, Inc. at its Jamestown, New York, facility; but excluding, all office clerical employees, draftsmen, engineering employees, watchmen, guards, and supervisors.

(b) Within 14 days after service by the Region, post at its facility in Jamestown, New York, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 19, 2013.

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

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."