

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD<sup>1</sup>**

**FORD MOTOR COMPANY**

**Respondent**

**Case 07-CA-198075**

**and**

**LOCAL 324, INTERNATIONAL UNION OF  
OPERATING ENGINEERS (IUOE), AFL-CIO**

**Charging Party**

**and**

**INTERNATIONAL UNION, UNITED  
AUTOMOBILE, AEROSPACE AND  
AGRICULTURAL IMPLEMENT WORKERS OF  
AMERICA (UAW), AFL-CIO, AND ITS LOCAL 245**

**Intervenor**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO THE  
RESPONDENT'S EXCEPTIONS<sup>2</sup>**

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<sup>1</sup> Throughout this brief the following references will be used:

Transcript: Tr (followed by page number)  
General Counsel Exhibit: GC (followed by exhibit number)  
Charging Party Exhibit: CP (followed by exhibit number)  
Respondent Exhibit: R (followed by exhibit number)  
Respondent Exceptions Brief: RB (followed by page number)  
Intervenor Exhibit: I (followed by exhibit number)  
ALJ Decision: ALJD: (followed by decision page number)

<sup>2</sup> All dates are 2017 unless indicated otherwise.

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**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING  
BRIEF TO THE RESPONDENT'S EXCEPTIONS**

Now comes Counsel for the General Counsel Robert A. Drzyzga who respectfully submits this Answering brief to the Board, and requests that Respondent's exceptions be denied in their entirety.

**I. INTRODUCTION**

This case involves a straightforward issue under Section 8(a) (5): Whether Ford Motor Company (Respondent) failed and refused to recognize and bargain with Local 324, International Union of Operating Engineers (IUOE), AFL-CIO (Charging Party) after insourcing bargaining unit work, and hiring a majority of its predecessor subcontractor's Jacobs Industrial Service (JIS) unit employees, and continuing JIS business operations virtually unchanged.

In *NLRB v. Burns International Security Services*, 406 U.S. 272, 80 LRRM 2225 (1972), the Supreme Court upheld Board law that a mere change in ownership in the employing entity is not such an "unusual circumstance" as to relieve the new employer of an obligation to bargain with the union that represented its predecessor's employees. In *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 125 LRRM 2441 (1987), the Court reaffirmed that the successorship determination depends upon the totality of the circumstances and focuses on whether the new company has substantial assets of its predecessor and continues, without interruption or substantial change, the predecessor's business operations. The factors relevant to the continuity between the old and new entities are: (1) whether there is continuity of the work force, as shown by a majority of predecessor employees being in the new work force; (2) whether there is continuity in the employing industry; (3) whether the bargaining unit remains intact and appropriate; and (4) the impact of a hiatus in operations.

Respondent attempts to argue that the insourced operations should be part and parcel of its existing skilled trades bargaining unit International Union, United Automobile, Aerospace and Agricultural Implement Workers of America.(UAW), AFL-CIO, Local 245 (Intervenor). Respondent's arguments to support such a claim are speculative and self-serving. Respondent ignores the collective bargaining history of its predecessor JIS with the Charging Party's unit; refuses to acknowledge that it hired a majority complement of JIS unit employees; refuses to acknowledge that it seamlessly commenced operations in virtually unchanged circumstances; and by the terms of its own launch agreement limited the extent to which it could change the operations of its predecessor JIS, thereby maintaining a continuity in its predecessor's business operations. The ALJ correctly concluded that Respondent violated Section 8 (a) (5) when it refused to recognize and bargain with the Charging Party. (ALJD, p 2, 31-37).

## **II. FACTS<sup>3</sup>**

### **A. Collective Bargaining History**

The Respondent's Drivability Test Facility (hereafter DTF) is a stand-alone building located at 8000 Enterprise Drive, Allen Park Michigan. The DTF was built in 1999 or 2000 by the Sverdrup Corporation, a wholly owned subsidiary of Jacobs International. (Tr 356-357) The DTF was and is currently used to perform wind tunnel testing on automobiles. (Tr 357-358) Respondent was a customer who utilized the DTF for such tests.

Since its inception, various employers were awarded the contract to run the DTF's operations. Each employer established collective bargaining relationships with the Charging Party and its affiliated locals. Siemens Building Technologies Inc., Facilities Management Services had the first such agreement (Tr 59; GC 25, p1 Article 1, Section 1). Local 547

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<sup>3</sup> The facts contained herein are a summary of those that Counsel for the General Counsel contends should be credited.

Operating Engineers was the collective bargaining representative of the unit employees at that time. Local 547 was the predecessor collective bargaining representative at the facility.

EMCOR Facility Services won the subsequent contract and entered into a collective bargaining agreement with Local 547. (Tr 59; GC 26, p 1, Article 1, Section 1) Jacobs Constructors Incorporated won the third facilities contract and entered into a collective bargaining agreement with Local 547. (Tr 60; p GC 15, p 1, Article 1, Section 1) Jacobs Industrial Services, Inc. (JIS) successfully bid the next three facilities agreements, and entered into collective bargaining agreements with the Charging Party which merged with Local 547 in September or October of 2009. (Tr 47). (Tr 61-64; GC 16, p 1, Article 1, Section 1; GC 17, p 1, Article 1, Section 1; and GC 18, p 1, Article 1, Section 1) The bargaining units in these agreements consisted of electricians and operating engineers only.

The Respondent purchased the DTF from JIS in about December of 2014. (Tr 359-360) Respondent ceded to Fordland, Respondent's real estate division, responsible for taking care of Respondent's property, buildings and assets, and management of the DTF facility. (Tr 70, 302, 565) JIS)continued to run the operations and maintenance of the facility after Respondent purchased the facility and Fordland assumed management responsibilities.

Not only does the Charging Party and its affiliates have a long collective bargaining history at the DTF, they have a long history of collective bargaining representing maintenance employees working for contractors at many of Respondent's Fordland properties located in the cities of Allen Park, Melvindale, Dearborn and Dearborn Heights, Michigan, and the surrounding areas. These relationships, dating back some 35 years, are located in the same geographic area of the Respondent's Research and Engineering Center (hereafter REC). (Tr 290, 615-620; I 2, CP 1)

The first of these collective bargaining relationships was between Local 547 and a Mechanical Heat and Cold, Inc. (Mechanical). The collective bargaining agreement was effective by its terms from May 31, 1982 through June 4, 1984. (Tr 65-66; GC 29, Appendix A) The original bargaining unit consisted of operating engineers and operating engineer trainees employed by Mechanical at the locations listed in Appendix "A"<sup>4</sup> of the collective bargaining agreement between Mechanical and the Charging Party in the operation, mechanical maintenance and repair of all refrigeration, heating and air- conditioning machinery installed in the listed locations and in the performance of general building maintenance. (GC 29, p 1, Article 1, Section 1) The collective bargaining relationship between Mechanical and the Charging Party continued through their last agreement, which expired on May 31, 1999. (Tr 67, GC 30) Fordland next awarded the facilities contract to Affiliated Business Services (ABS). Local 547 signed an agreement with ABS effective by its terms from June 1, 1999, through May 31, 2004. (Tr 68; GC 31) Fordland next awarded the facilities contract to One Source, who in turn entered into a collective bargaining agreement with Local 547, effective by its terms from June 1, 2004, through May 31, 2007. (Tr 71: GC 32) Fordland next awarded the facilities contract to ABM Engineering Services, who in turn entered into a collective bargaining agreement with Local 547 effective by its terms from June 1, 2007, through May 31, 2011, for the Fordland bargaining unit. (Tr 72: GC 20)

The two most recent collective bargaining agreements for the Fordland facilities are between C.B. Richard Ellis (CBRE) and the Charging Party, dated June 1, 2011, through May 31 2014 (GC 21); and June 1, 2014 through May 31, 2018 (GC 22) respectively . (Tr-72-74) The unit in the most recent agreements consists of all Operating Engineers and Operating Engineer Trainees employed by the Employer at the buildings within the Employer's scope of work with

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<sup>4</sup> Appendix A lists the Fordland Locations included in the unit.

*Ford Land's commercial properties* (Emphasis added) in the operation, mechanical maintenance and repair of all refrigeration, heating and air -conditioning machinery installed in the said locations and in the performance of general building maintenance.

Charging Party steward David McDonald has worked at Fordland facilities on behalf of CBRE since 2006. (Tr 608-610) Most of the facilities he works at are owned or leased by the Respondent or Fordland. McDonald services approximately 30 to 36 buildings as a mobile HVAC technician. (Tr 608, 611-612) Approximately 33 of the buildings he services are located in the cities of Allen Park, Melvindale, Dearborn and Dearborn Heights, the same geographic area in which the Intervenor has a collective bargaining agreement with the Respondent for maintenance services at the REC. (Comparing CP 1 to I 2<sup>5</sup>). McDonald also performed work at facilities outside of this geographic area. (Tr 620)

McDonald testified that while he performed mobile unit work, other operating engineer unit employees were assigned to specific facilities. The work McDonald and other mobile engineers performed included a "little bit of everything," including heating and cooling, rooftops, boilers, light plumbing, and some light electrical work. Engineers stationed at the buildings also do a "little bit of light everything." They, the mobile operating engineer unit employees, also do all the chiller work and boiler work, oil samples, readings, punching tubes on the chillers, maintenance on the boilers, replacing parts and everything that a normal operator

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<sup>5</sup> Twenty six of these facilities are listed on maps admitted as exhibits CP1 and I 2 during the hearing. An additional seven facilities, building numbers 5036, 5153, 5096, 5170, 5045, 5287 and 5304, all of which are located within the same geographic area where McDonald performed bargaining unit work for CBRE on behalf of the Respondent and Fordland, were not listed on CP 1 and I 2. (Tr 618-619)

In addition, I 2 contained a number of errors with respect to the facilities that were part of the bargaining unit between the Respondent and Intervenor. It appears Itek buildings 5298 and 5297, and building 5324 are not included with the 58 facilities the Intervenor asserts are covered by its collective bargaining agreement with the Respondent. (Tr 444-445, 470-475)

would do to maintain the equipment in their respective building to a running satisfaction. (Tr 620-621)

McDonald was asked during cross examination if operating engineers at the facilities he works at do research and engineering, research prototype testing or design new Ford Motor Company vehicles. McDonald testified that while his customers do not do actual parts on the car, they have quite a few buildings that do testing for the autonomous vehicles, indicating that some of the facilities he services do perform duties which could be classified as research and engineering work. (Tr 627)

It is apparent that the Charging Party and its affiliates have a significant history of collective bargaining at facilities owned, leased and managed by the Respondent and Fordland in the same geographic area where the REC is located.

#### **B. Events Leading up to Insourcing**

On February 2, Charging Party business representative James Arini was notified by Don Austin, Jacob Industrial Services' (hereafter JIS) Manager of Labor Relations, that JIS lost the maintenance service contract at the DTF. On March 18, the Respondent sent tentative job offers to four of the five current employees working at the DTF who were represented by the Charging Party<sup>6</sup>: John Kurzawa, Jesse Miller, Karl Wynn and Kristian Peters. (GC 2-9)

Arini subsequently spoke to Austin and an unknown representative from CBRE who informed him Cheryl Chadwick was the point of contact at Fordland for the transition. (Tr 50-53) On April 13, Arini sent a letter to Chadwick requesting that Respondent recognize and bargain with the Charging Party as the unit's collective bargaining representative. (Tr 53-54; GC 12). On April 24, Chadwick responded to Arini's demand for recognition and bargaining by

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<sup>6</sup> As of December 2016, there were six unit employees at the DTF; John Kurzawa, Jason Ricks, Carl Wynn, Kristian Peters and Robert Pickens. Pickens was terminated prior to the transition. Ricks applied for a position with the Respondent but was not offered a position. (Tr 146-147, 171)

indicating that the Respondent did not recognize the Charging Party and that all of its employees at the Allen Park facility were represented for purposes of collective bargaining by the United Auto Workers. (Tr 54; GC 13) On April 24, Keith Tafelski, Fordland's Human Resource Manager, and Paul Vergari, the Intervenor's Local 245 Chairman, entered into a launch agreement for the DTF (GC 28) The agreement included retention of the JIS salaried staff, the first line supervisors at the facility for the predecessor employer JIS who supervised the Charging Party's unit members prior to the transition, to continue to provide direction to the UAW-represented skilled trades employees post transition. The launch agreement also included additional requirements including, but not limited to, a provision that allowed Respondent to cancel the agreement with 90 days' notice. (Tr 448-449; GC 28, p 2, number 2) On April 26, Don Austin sent Arini a letter indicating that the last date of employment for JIS employees would be April 24<sup>7</sup>. (Tr 54-55; GC 14) On April 24, the Charging Party's unit members began working for Respondent at the DTF, and per Respondent, were now represented for purposes of collective bargaining by the Intervenor.

### **C. Operations at the Drivability Test Facility (DTF) Prior to Insourcing**

In the months leading up to April 24 the DTF's maintenance bargaining unit was fully staffed by six employees: John Kurzawa (day shift electrician), Carl Wynn (afternoon shift electrician); Jesse Miller (day shift operating engineer); Kristian Peters (midnight shift operating engineer), Jason Ricks (midnight shift operating engineer), and Robert Pickens (afternoon shift operating engineer). Pickens was terminated around December 23, 2016 for allegedly sleeping on the job, so the unit had only five employees as of April 23. Respondent did not offer Ricks a position. (Tr 102, 146-147, 171-173, 197-198, 226, 228)

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<sup>7</sup> The record indicates that the JIS employees' last day of work for JIS was April 23, and their first day of work for the Respondent was April 24. (GC 23 and 28)

These employees worked exclusively for JIS at the DTF facility and were represented for purposes of collective bargaining by the Charging Party. (GC 18) There is no *credible* record evidence that any member of the Intervenor's Local 245 bargaining unit, or any other labor organization, performed Charging Party bargaining unit work at the DTF prior to April 24<sup>8</sup>. (Tr 103, 173, 229) The Charging Party represented the unit employees at this facility during the entire time period the facility was operational since approximately 1999 or 2000, a period of approximately 18 years. (GC 15-18, 25 and 26) The Charging Party's unit employees never performed bargaining unit work outside of the DTF during that period of time or at any other time thereafter. (Tr 113, 237-238, 547)

The unit employees worked at the stand alone DTF. (Tr 180) Respondent was their employer's customer. (Tr 174, 226, 229) When they reported to work, they parked in the north end parking lot next to the facility. (Tr 111-113, 234) They went to their work areas and gathered their work tools. (Tr 110-111, 179) They all worked in the same department. (Tr 172-173) They picked up their work order folders from their respective work areas, which were prepared by their JIS support person Don Knott. The work orders were generated from a system called C-works. (Tr 107-108, 176-177, 231-233)

The employees would then do their morning turnover and walk-throughs. The turnover and walk-throughs consisted of meeting with their counterparts to pass on job related information or discuss problems found during the prior shift that required attention. (Tr 106-107, 173, 229) Employees would then contact their customers to determine if the equipment, work area or test cell requiring maintenance work was accessible. They would perform their

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<sup>8</sup> Paul Vergari first testified that no employees from his unit worked at the DTF prior to April 24, and then stated that he believed there was one instance, date unknown, when his unit members worked at the facility prior to April 24. His testimony should not be credited. The record does not reflect when the work was done, what type of work was performed, or who approved the work being done in breach of the Charging Party's contract with JIS. (Tr 438-439)

work tasks. (Tr 102, 106-107, 230) Unit employees would also take requests from personnel assigned in the facility outside of the work order system. If an engineer or manager had a problem with the temperature in their office or needed assistance in moving a heavy object, the unit employees would assist them. (Tr 178)

The unit employees performed maintenance throughout the entire DTF, and were not limited to a specific department, floor or area. (Tr 110-111, 179) Their job duties included, but were not limited to, replacing filters, belts and seals; greasing bearings; rebuilding valves and associated actuators two inches and smaller; replenishing fluids such as oil, refrigerant, and secondary coolants; replacing standard lighting lamps; repairing and overhauling equipment within the capabilities of the personnel and maintenance shop; assisting in the repair of existing test facility control computer software and components; replacing solar simulation brims; and performing trouble shooting and repairs as required. (GC 10, p 1).

In addition to their primary duties, unit employees performed ancillary tasks. For example, operating engineers worked on maintaining the refrigeration plant, the electrical plant, dynamometers, and essentially all the test equipment. Operating engineers performed work on cooling towers including preventive maintenance, belt changes, cleanings and water chemistry. In addition, operating engineers would work on pretty much anything they received work orders for. If somebody complained that the room was too warm or too cold, or water was leaking through the roof, or collecting on the floor in the test cell, operating engineers would repair it. Other work assignments included, but were not limited to, drywall repair, painting, ceiling tile repair and fabricating some equipment to move a large ramp. (Tr 102, 105, 109-110, 172, 175-176)

Operating engineers also assisted electricians as needed. In some instances, they would hold or lead the end of a conduit or a tape measure and guide wires electricians were pulling, or pull wire themselves. They would also troubleshoot fuses on the non-load end of equipment. In addition, they would assist the electricians with fan brush changes. (Tr 102, 105, 109-110, 172, 175-176)

Electricians' duties included the installation of lighting and test cell lighting, and the installation of main power for new refrigeration chillers, amongst other duties. Electricians helped operating engineers with oil and filter changes on compressor and refrigeration systems. Electricians assisted with replacing slide valves, potentiometers, and temperature sensors on different refrigeration and HVAC systems. In addition, electrician John Kurzawa covered 12-hour weekend shifts on Saturdays and Sundays, and was responsible for monitoring plant systems including the refrigeration and boiler systems. (Tr 226, 230, 233-234)

If employees had questions about their work tasks, they contacted their immediate supervisor Ron Sirhan. If employees required a day off for an appointment, a vacation day, or had problem with their timecard or paycheck, they contacted Ron Sirhan to process and make these requests. If Sirhan was not available, they directed their requests through Jason Maggard, Sirhan's superior and their manager. (Tr 105-106, 113, 174, 181-182, 231-232, 237, 601) If employees required a break or lunch, they could use the employee break area or maintenance office in the DTF to do so. Employees also had access to a locker room on site that had showers for their use, had assigned personal lockers in the facility, and had toolboxes and tool belts provided by their employer. (Tr 111-113, 180-181, 235-236) At the end of the day the employees would contact their counterparts and perform a shift walk through and turn in their work orders before going home for the day. (Tr 103) Work that could not be performed by

operating engineers' bargaining unit personnel was outsourced to various contractors. (Tr 137-138)

JIS personnel were responsible for on-site safety and security support at the DTF facility. These safety requirements were mandated by their contractual scope of work with the Respondent. JIS personnel were required to work with department Health, Safety, and Environmental representatives to meet all department, corporate, and regulatory guidelines and /or requirements. This included, but was not limited to, conducting safety walk-throughs and performing safety compliance inspections (Flammable Cabinets, Eyewash Stations, Ladder Route etc.) (GC 10, p 2-3) In order to meet these requirements JIS would send its unit employees email communications regarding safety tips and measures. (Tr 158)

#### **D. Operations at the Drivability Test Facility (DTF) After Insourcing**

On April 24 Respondent and Fordland took over operations of the DTF from JIS. The Intervenor displaced the Charging Party and became the maintenance unit employees' collective bargaining representative under a preexisting contract between the Respondent and the Intervenor. (Tr 311) The Respondent hired six employees to be permanently assigned to the DTF, a majority of its alleged projected complement of 10 employees (Tr 458, 576, 586), to perform the maintenance bargaining unit work at the DTF. As noted above, these employees included former JIS employees Kurzawa, Miller, Wynn and Peters, hereafter referred to collectively as the transition employees. (Tr 195-196, 250) Respondent also transferred two of its current employees from other facilities to the DTF, George Dusaj and Carl Smith, who were already Respondent employees and Intervenor members. Dusaj and Smith never worked at the DTF prior to April 24<sup>9</sup>. (Tr 164, 197-198, 250, 486-487)

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<sup>9</sup> Seeing that Dusaj and Smith never worked at the DTF prior to April 24, their employee perspective is irrelevant for purposes of a successor analysis.

On April 24 the transition employees reported to the same DTF facility they had worked at for years with no break in employment. (Tr 118, 130, 189-190, 241-243) None of the transition employees performed bargaining unit work outside of the DTF facility after the transition and none were transferred out of the facility as of November 8. (Tr 119, 132, 156, 159,198,439) When they reported to work, the transition employees parked in the same parking lot. (Tr 130, 195-196, 234, 248) They used the same locker room, lockers and break areas. (Tr 118, 130, 249) They performed work for the same end user: the Respondent. (Tr 127, 190, 243) They went to their same work areas and gathered their same work tools. (Tr 130, 195-196, 234-235, 248) They worked on the same shifts in the same department. (Tr 127, 190-191, 197, 243, 250) They picked up their same work order folders from their same work area, which were prepared by their same JIS support person, Don Knott. (Tr 119, 129, 160, 192, 246) The work orders were generated from the same C-works system. (Tr 129, 193, 246) The transition employees perform the same morning walk-throughs, albeit possibly with two new employees Dusaj and Smith, who replaced former JIS employees Ricks and Pickens. (Tr 129, 245-246) They performed the same tasks throughout the same entire facility, and were not limited to a specific department, floor or area. (Tr 129, 189-190, 198-199) They had the same immediate supervisor Ron Sirhan<sup>10</sup>, who directed their work, approved their time sheets and payroll requests and granted time off requests: all accepted indicia of supervisory status. (Tr 120, 160, 190-191, 237, 243-244, 396, 400, 449, 483-484, 487, 600-601) If Sirhan was unavailable, the transition employees would make these requests through their same manager Dave Maggard, who eventually replaced Sirhan and assumed Sirhan's duties. (Tr 128,130, 195-196, 237, 243-244, 259)

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<sup>10</sup> Sirhan subsequently left the facility in about August for another position with JIS. Maggard replaced him.

On April 24 the transition employees' job duties remained virtually unchanged. The transition employees continued to replace filters, belts and seals; grease bearings; rebuild valves and associated actuators two inches and smaller; replenish fluids such as oil, refrigerant, and secondary coolants; replace standard lighting lamps; and trouble shoot and make repairs as required. While overtime opportunities increased and some job duties were streamlined, for example employee Kurzawa no longer working weekend shifts monitoring the facility (Tr 233), the transition employees continued to perform their normal job functions and assisted each other as they previously did. (Tr 119, 129, 192, 198-199, 241-243)

While the transition employees had concerns about what they could or could not work on because of the new contractual job classifications they were now working under, the transition employees were told that they were to conduct business as usual and that their job duties were the same. (Tr 119-122, 192) When transition employee Peters was concerned because of his new role in a new bargaining unit, he questioned whether he could do certain tasks and have other employees assist him because it may be work performed by other unit members. Peters was informed at some point in time that he could not even spot for an electrician. (Tr 120) Peters was instructed by supervisor Sirhan that they were operating off the launch agreement between Ford and the UAW, and it was "business as usual for the first year." (Tr 119-122; GC 24). Sirhan further instructed Peters to perform certain power control lock out procedures under the old JIS standard, even though the procedure did not meet Respondent's specifications. (Tr 150)

Transition Employees Kurzawa and Miller also had conversations with their supervisor Sirhan and Respondent Manager Gerling regarding their job duties. The first of these conversations was in the late spring or early summer in a Monday morning meeting after the April 24 transition. Kurzawa did not want grievances filed against him, and Miller did not want

to step on anyone's toes with respect to duties he could or could not perform under the contract between the Respondent and Intervenor. Both Sirhan and Gerling told Kurzawa and Miller that they should perform their work as usual. Gerling also said that the Respondent wanted other UAW members to start working more like Kurzawa and Miller worked, and their jobs would not change and remain the same. (Tr 193-195, 207, 246-247, 260, 269-271). All three transition employees were told<sup>11</sup> they would not be bumped from their positions at the DTF for at least one year. (Tr 116-117, 215, 257, 260, 269-271)

The DTF continued to outsource work as it previously had prior to the transition, including, but not limited to jobs regarding dynamometers, roof repairs, fire safety system inspections, boiler service and inspections and work on underground storage tanks. (Tr 137-138, 157-158, 442-443; I 9)<sup>12</sup>

After the April 24 the transition, employees' interchange with the employees in the Intervenor's larger unit was minimal, on a less than full time basis (Tr 459) and temporary at best. The Intervenor's unit consisted of approximately 800 employees, 526 of whom worked in the skilled trades. (ALJD p 6, l 15-18) Transition employees were required to attend Respondent's two week mandatory orientation training for *all new hires*, but after they completed training they returned to their normal duties at the DTF. (Tr 202, 215, 267) No transition employee performed unit work outside the DTF at any time since the transition. (Tr 156, 198, 221) While approximately 13 SSEs and four electricians were provided what was described as a building orientation at the DTF, which lasted between three to nine days, none of these employees were permanently assigned to the DTF. Indeed, they returned to their prior

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<sup>11</sup> Peters testified that Vergari told him this. (Tr 116-117) The other transition employees indicated they were told this as well.

<sup>12</sup> Paul Vergari admitted that at least two subcontractors worked at the facility since the transition.

duties once the orientation was completed. The first of these orientation sessions for the *additional* SSEs did not occur until the middle of August, and for the *additional* electrician employees, the first orientation session did not occur until August 6. In both instances, orientation occurred more than three months after the April 24 transition. (Tr 135-136, 155-156, 213-214, 411-412, 414-415, 489, 491, 544, 576,586; I-13 and I-14)<sup>13</sup>

There were two emergencies at the DTF after April 24 which required outside assistance, a door failure and a waterline break. Both were safety issues and required immediate responses. (Tr 408, 433, 602-603) There was a combustion safety project initiated in the DTF that was due in part to past safety problems Respondent encountered at its Rouge plant. (Tr 453-454) The project started in mid-October, over five months after the transition, involved only two employees and after two weeks of work was 40 percent complete. (Tr 509-512; I 17) Minimal overtime was worked at the DTF by other Intervenor unit members. On October 22, employee James Muhammad worked one eight-hour day of overtime at the DTF. approximately six months after the transition, and did not interact with any other employees on his shift. (Tr 528) Employees Thomas O'Malley, Gerald Maynard and Emanuel Dan, all who testified at the hearing, did not work any overtime at the DTF. (Tr 516, 539) Employee Maynard worked one hour at the DTF in late July or early August, approximately three months after the transition, to reset a tripped circuit breaker. (Tr 550, 553-554) There is no other *non hearsay* record evidence

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<sup>13</sup> Paul Vergari testified that he believed 13 SSEs were trained on unknown dates. (Tr 441) Exhibit I-13 does not have any dates on which the training occurred. George Dusaj testified that he first "trained" SSEs in the middle of August. Jesse Miller had trained five SSEs but did not specify the dates. With respect to the electricians, only four electricians training dates are listed, the earliest date being August 6 for employee Emanuel.

During the hearing, the orientation was described by transition employees not as training, but more of a familiarization with the facility. (Tr 213-214) Dusaj testified that he was not allowed to work at the facility alone until July 5, over two months after he first began working at the facility. Dusaj stated his supervisor Sirhan wanted him to be trained for at least two months. (Tr 484, 488-489) Accordingly, it appears these other employees were given a site orientation or what should be considered, at best, partial training.

that other Intervenor employees who were not permanently assigned to the facility worked at the DTF on a regular basis or on overtime.

In summary, approximately 27 employees out of a unit of 526 skilled tradesman, or approximately 5 percent of the Intervenor's unit, had limited, intermittent, inconsequential, or in one case no contact<sup>14</sup> with the DTF transition employees while working at the DTF. (ALJD p 13, 11-25; Tr 528)

### III. RESPONDENT'S EXCEPTIONS<sup>15</sup>

#### A. Respondent was a Successor Employer. (Related to Respondent Exceptions 1-6, 8-9, 11-14, 16-17, 19-30, 33-41, 43, 46-47, 49-50, 59-60, 61, 63, 64, 66, 70, 74-75, 77, 79, 84-85, 91-93, 97, 99, 100-102)

Respondent argues that it was not a successor employer because the transition employees did not constitute a majority of the Intervenor's unit; the alleged extensive interchange between transition employees at the DTF and the Intervenor's unit; the Respondent's ability to transfer transition employees at any time following the expiration or cancellation of the Launch Agreement; and because the Complaint amendment regarding the unit was inappropriate.

Regarding the appropriate employee complement, as the ALJ noted:

“Even assuming, arguendo, that the full complement of DTF employees will be ten, the six employees who began normal operations on April 24, 2017, clearly represent a substantial and representative complement. The six employees began full normal operations of the DTF maintenance and continued as the work force for many months, through the close of the hearing, working in the same classifications and performing the same work that the full Jacobs complement of maintenance unit employees had historically performed. The very point of the substantial and representative complement rule is that awaiting a full complement to measure a bargaining obligation “fails to take into account the significant interest of employees in being represented as soon as possible,” an interest that is “especially heightened” in the successorship situation. *Fall River Dyeing*, 482 U.S. at 49–50.

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<sup>14</sup> Employee Muhammad testified he had no contact with any DTF employees.

<sup>15</sup> Counsel for the General Counsel's Answering Brief mirrors Respondent's Exceptions as outlined in Respondent's Exceptions brief except for Exception E, which addresses the proposed remedy.

Six of ten employees working the normal operations in even half the ultimate classifications is a substantial and representative complement. "In general, the Board finds an existing complement to be substantial and representative when approximately 30 percent of the eventual employee complement is employed in 50 percent of the job classifications." *Shares, Inc.*, 343 NLRB 455, 455 fn. 2 (2004), enfd. 443 F.3d 939 (7th Cir. 2006); *NLRB v. Asbury Graphite Mills, Inc.*, 832 F.2d 40, 43 (3rd Cir. 1987) (33% of "contemplated" total was a substantial and representative complement), enforcing *Asbury Graphite Mills, Inc.*, 282 NLRB 448 (1986); *Gerlach Meat Co.*, 192 NLRB 559 (1971) (35%). See also, *General Cable Corp.*, 173 NLRB 251 (1968) (31%)".

(ALJD p 24, l 11-31)

As of April 24, the date Respondent took over operations, there were six employees working at the facility in the same classifications, electricians and engineers, as when JIS ran the operations. There was no hiatus in operations, and at the close of the hearing, approximately six and one half months later, the same six employees were still working in the same classifications and had not been transferred from the facility. In addition, the Respondent by its own Launch Agreement dated April 24, treated this facility as a separate stand-alone unit by requiring retention of the predecessor's supervisors, requirements that operations be conducted in a cost efficient manner, special meetings to determine progress on the transition, special training requirements for the Intervenor's unit members prior to them being allowed to even work in the DTF facility and a provision that allowed Respondent to cancel the agreement with 90 days' notice. (Tr 448-449; GC 28 generally and p 2, number 2) Respondent further admits in its brief that it is prohibited from transferring the four transition employees under the launch agreement, precluding any interchange during the term of the agreement. (RB P 17, last three lines)

Regarding the multiple, regular interchanges asserted by Respondent, the record evidence is clear that such interchange did not occur. In summary, approximately 27 employees out of a unit of 526 skilled tradesman, or approximately five percent of the Intervenor's unit, had

limited, intermittent, inconsequential, or in one case no contact<sup>16</sup> with the DTF transition employees while working at the DTF. (ALJD p 13, l 1-25; Tr 528)

Respondent's argument regarding the unit amendment also lacks merit. Counsel for the General Counsel's motion to amend the Complaint was for the purpose of correcting an administrative error and adding language conforming the unit to the most recent unit description in the Charging Party's agreement with predecessor JIS. (ALJD p 3, Fn. 2) It should further be noted that the original unit pled in the Complaint contained the language "All full time and regular part time...." Respondent implies in its Brief in Support of Exceptions that this language was added to the Complaint for the first time at the hearing. This specific language was in the original Complaint issued July 26. (See RB p 18, last paragraph italics *all full time and regular part time*. Compare GC Ex 1(d), p 2, para 9)

Section 102.17 of the Board's Rules authorizes the judge to grant complaint amendments "upon [terms that] may seem just" during or after the hearing until the case has been transferred to the Board. See also *Folsom Ready Mix, Inc.*, 338 NLRB 1172 fn. 1 (2003). Although this provision affords the judge "wide discretion" to grant or deny a motion to amend, in exercising that discretion the judge should consider: "(1) whether there was surprise or lack of notice; (2) whether there was a valid excuse for the delay in moving to amend; and (3) whether the matter was fully litigated *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 n. 8 (2015), enfd. 651 Fed. Appx. 34 (2d Cir. 2016).

In *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990), the Board stated that the test is whether the issue "is closely connected to the subject matter of the complaint and has been fully litigated." With respect to whether an issue has been "fully litigated," the Board stated that this "rests in part on whether the absence of a specific

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<sup>16</sup> Employee Muhammad testified he had no contact with any DTF employees.

allegation precluded a respondent from presenting exculpatory evidence or whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made.”

Here, there was no surprise or lack of notice because Respondent knew since July 26, the date the Complaint issued, that the Region was proceeding on a theory that the Respondent was a successor employer who had a duty to bargain with the Charging Party. No additional substantive allegations were added to the Complaint. Further, Administrative Law Judge Goldman informed Respondent’s counsel that he would provide Respondent additional time if necessary to prepare for the unit amendment. (Tr 97-98) Most importantly, Respondent’s counsel admitted that the unit amendment did not change Respondent’s defense. (Tr 96)

The Respondent was not surprised, and was given proper notice and an opportunity to present evidence on the amendment. This matter was fully litigated and Respondent was not denied due process. Administrative Law Judge Goldman acted properly within his discretion in granting the amendment.

**B. There is Substantial Continuity between the Operations of JIS and Respondent. (Related to Respondent Exceptions 1-10, 13-16, 18-38, 42-43, 45-48, 50-60, 62-66, 69-70, 75-77, 78, 80, 85, 100-02).**

Respondent argues that there was no continuity in Respondent’s DTF business operations when compared to the predecessor JIS because the majority of employees in the new unit constituted a slim majority; the processes and procedures at the DTF changed drastically; numerous skilled trades personnel employed by Respondent now perform skilled trades work at the DTF; DTF based employees jobs and working conditions have changed in a number of significant ways; the supervisory structure has changed; and the quantity of buildings serviced by the Intervenor on behalf of the Respondent.

With respect to the majority status issue, ALJ Goldman noted:

“Finally, I note that the UAW contends (I. Br. at 43) that “only the barest possible majority” of Jacobs employees constitute the proposed unit—four of six—and that this “informs” the successorship analysis. It does, but in favor of successorship, as it is more than the majority required under *Burns* for a finding of successorship. The UAW laments that if Ford initially had transferred in only one more Local 245 member and hired one less Jacobs’s employee, former Jacobs’s employees would compose a bare 50 percent of the unit. But the salient point is that Ford voluntarily chose, for its own benefit, to hire a majority of the unit from the Jacobs’ employees. Ford said it felt “more comfortable” that way. Thus, Ford chose the bargaining obligation. *Fall River Dyeing*, 482 U.S. at 40–41 (“the successor is under no obligation to hire the employees of its predecessor” and “[t]hus, to a substantial extent the applicability of *Burns* rests in the hands of the successor. . . . This makes sense when one considers that the employer intends to take advantage of the trained work force of its predecessor”).”

(ALJD p 25, 19-20)

As previously discussed, on April 24, Respondent hired four of the predecessor’s employees of a total complement of six and the four constitute a majority of the DTF unit. The Respondent therefore has a duty to bargain with the Charging Party.

Regarding changes in the processes and procedures and nature of the Respondent’s work, ALJ Goldman pointed out:

“In considering substantial continuity, “[t]he employing enterprises are not the overall companies involved, but the . . . facilities whose employees were taken over by Respondent.” *Southern Power Co.*, 353 NLRB 1085 (2009), adopted, 356 NLRB 201 (2010), enfd. 664 F.3d 946 (D.C. Cir. 2012). “Continuity of the employing industry requires consideration of the work done.” *Saks Fifth Avenue*, 247 NLRB 1047, 1050–1051 (1980). Importantly, the question of the substantial continuity of the enterprises is to be analyzed primarily from the “employees’ perspective.” *Fall River Dyeing*, 482 U.S. at 43. In its analysis, the Board is mindful of whether “those employees who have been retained will understandably view their job situations as essentially unaltered.” *Id.* (internal quotation omitted); *Vermont Foundry Co.*, 292 NLRB 1003, 1008 (1989); *Derby Refining Co.*, 292 NLRB 1015 (1989), enfd. 915 F.2d 1448 (10th Cir. 1990). “The key test in determining whether a change in the employing industry has occurred is whether it may reasonably be assumed that, as a result of transitional changes, the employees’ desires concerning unionization have likely changed”), enfd. in relevant part, 634 F.2d 681 (2d Cir. 1980); *Jeffries Lithograph Co.*, 265 NLRB 1499, 1504 (1982), enfd. 752 F.2d 459 (9th Cir. 1985).

Here, the continuity between Ford's DTF maintenance support and Jacobs' maintenance support at DTF is more than substantial. Clearly, with regard to maintenance at the DTF, on April 24, 2017, Ford assumed and "continued, without interruption or substantial change, the predecessor's business operations" (*Fall River Dyeing*, supra, quoting Golden State Bottling Co., supra) providing the skilled and general maintenance to the DTF facility".

(ALJD P 15, L 43-53; P 16, L 1-10)

Respondent's overall business operations of designing and manufacturing automobiles is not a factor in this analysis. In addition, as previously discussed above, there were not numerous Intervenor's skilled tradespersons performing work on an on call basis at the DTF after April 24. (RB P 21, last paragraph). Approximately five percent of the Intervenor's unit members worked at the DTF on a limited, intermittent basis. None of them worked at the facility prior to April 24.

Respondent's emphasis on safety was nothing more than a continuation of training that its predecessor JIS was required to perform under its contractual scope of work with the Respondent. JIS personnel were required to work with department Health, Safety, and Environmental representatives to meet all department, corporate, and regulatory guidelines and /or requirements. This included, but was not limited to, conducting safety walk-throughs and performing safety compliance inspections (Flammable Cabinets, Eyewash Stations, Ladder Route etc.) (GC 10, p 2-3) JIS would send its unit employees email communications regarding safety tips and measures. (Tr 158)

Regarding the implementation of Respondent's new computer system for work orders, that system was not in operation as of the date of the hearing, over six months after the launch date of April 24.

DTF transition employees' jobs and working conditions did not drastically change after the transition on April 24:

“Three of the four former Jacobs employees who were rehired by Ford testified, and they each testified credibly that nothing of significance had changed in their work once they transitioned to become Ford employees. Without any hiatus, they went from Jacobs to Ford and continued reporting to the same facility, performing the same work, with the same duties, using the same tools, in the same location, relying on the same work systems. Their immediate supervision remained the same—indeed, the front-line supervision remained the Jacobs Engineering supervisors—a circumstance specifically negotiated for by Ford and the UAW in the Launch Agreement (“Purchased service salaried staff will continue to perform their current work and provide direction to the UAW Skilled Trade employees”). The customer remained the same and the employer performing the wind testing remained the same. As of the time of the hearing in this case—more than six months after the commencement of normal operations under Ford—not a single additional employee had bumped in, been transferred in, or otherwise regularly assigned as an ongoing DTF skilled maintenance employee”.

(ALJD P 16, L 12-24)

“Neither Gerling, Sirhan, Brayman, Shotwell, nor Knott testified. All of the employees’ testimony about being told that they were to operate in the same manner as before the transition, that it is “business as usual,” that there would be flexibility regarding UAW rules, and all such related testimony, was un rebutted and is credited”.

(ALJD P 10, FN. 9)

The transition employees who testified were found credible by ALJ Goldman, *and they were*. It is well established that the Board will overrule a judge's credibility findings only where “the clear preponderance of all the relevant evidence convinces us that they are incorrect.” This is a high standard. *Standard Drywall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951) *None* of ALJ Goldman’s credibility resolutions should be overruled. As noted, none of the supervisors testified at the hearing and the transition employees’ testimony was un rebutted. As such, an adverse inference should be drawn. (The failure of an [opposing party] to produce evidence, including testimony, in its possession or control with respect to the existence or non-existence of the fact, is a relevant consideration in determining whether to find the fact.” *Fred Stark and Jamaica 201 St. Corp., Inc.*, 213 NLRB 209, 214 (1974), *enfd.* 525 F.2d 422 (2nd Cir. 1975), *cert. denied* 96 S. Ct. 1463 (1976)).

Respondent did not change the transition employees' supervisory structure and its argument that the sheer quantity of the facilities wherein employees represented by the Intervenor perform work demands transition employees' inclusion in the Intervenor unit lacks merit. The transition employees reported to the same facility and to the same supervisors, Sirhan, Maggard and Knott. In addition, the supervisory assignment of Sirhan, Maggard and Knott was mandated by the Launch Agreement between the Respondent and Intervenor. The Launch Agreement *does not* cover the terms and conditions of employment of the Intervenor's unit members in effect at Respondent's other 58 facilities. In the launch agreement, Respondent notes that it requires the use of innovative approaches, and reserves to itself the ability to cancel the bargaining unit work with 90 days' notice, and establishes other special requirements. These other special requirements include the appointment of a special coordinator (which had not been done as of November 8), detailed tracking of metrics, in depth weekly and quarterly business reviews and the development of a versatility matrix to identify specific equipment and tasks that would require training for employees at Respondent's 58 other facilities to be eligible to work at the DTF. (GC 28) It is apparent from the launch agreement that the transition employees possess special skills and knowledge that is not shared with employees from Respondent's 58 other facilities, and why the predecessor's supervisory staff was retained to manage the transitioned unit.

While the Respondent boasts of its collective bargaining history with the Intervenor, and how the sheer quantity of its facilities that the Intervenor services should rule the day, it concurrently snubs its nose at the Charging Party's history of collective bargaining within its properties. The Charging Party enjoyed a 17-year history of collective bargaining at the DTF facility with Respondent's predecessor JIS and others when DTF operated as a stand-alone unit.

In addition, approximately 33 other Fordland facilities in the same geographic area as the Intervenor's REC facilities have collective bargaining arrangements with the Charging Party. (Tr 620, CP 1 and I 2; ALJD P 6, FN. 5) Accordingly, Respondent's "quantity" argument should not factor into any unit determination.

**C. Respondent has assigned a representative complement of tradespersons to the DTF. (Related to Respondent Exceptions 1-9, 39-41, 44, 46, 48-49, 58-59, 61, 83-85, 90-91, 93-97)**

In summary, Respondent argues that it has not hired a substantial complement at the DTF and should not be punished for its gradual transition in increasing its complement.

Respondent's argument lacks merit<sup>17</sup>:

"Six of ten employees working the normal operations in even half the ultimate classifications is a substantial and representative complement. "In general, the Board finds an existing complement to be substantial and representative when approximately 30 percent of the eventual employee complement is employed in 50 percent of the job classifications." *Shares, Inc.*, 343 NLRB 455, 455 fn. 2 (2004), *enfd.* 443 F.3d 939 (7th Cir. 2006); *NLRB v. Asbury Graphite Mills, Inc.*, 832 F.2d 40, 43 (3rd Cir. 1987) (33% of "contemplated" total was a substantial and representative complement), *enforcing Asbury Graphite Mills, Inc.*, 282 NLRB 448 (1986); *Gerlach Meat Co.*, 192 NLRB 559 (1971) (35%). See also, *General Cable Corp.*, 173 NLRB 251 (1968) (31%).

Moreover, while Ford's claim that it ultimately intended to assign plumbers and millwrights to the DTF maintenance is far too uncertain to rely upon—according to Vergari as of November 2017, it had not been determined if there was enough work to permanently station a millwright or a plumber at the DTF—the April 24 complement of electricians and steam engineers meets the 50% of full classification threshold, even though, in fact, the Board does not necessarily require even a majority of the anticipated job classifications be filled in order to find a substantial and representative complement. *Endicott Johnson*, 172 NLRB 1676 (1968) (substantial and representative complement with less than 50% of ultimate classifications filled)".

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<sup>17</sup> Counsel for the General Counsel incorporates his arguments from Exception A above into Exception C.

(ALJD P 24, L 22-31; P 25, L 1-7)

The DTF operated with two electricians and three engineers prior to the April 24 transition. (ALJD P 4, L 27-31) On April 24, and through the end of the hearing on November 8, the DTF operated with two electricians and four engineers, the same complement that the DTF had operated with prior to the dismissal of one of the JIS employees for cause prior to the transition. (ALJD P 8, L 34-41) This complement did not change for over six months, and no new classifications were added to the facility on a permanent basis.

Respondent's assertion that it was going to increase head count and add new job classifications is self-serving. The launch agreement provided that Intervenor unit members were required to be trained before working at the DTF. As of August approximately 23 Intervenor unit members were trained but not one was assigned to the DTF. (ALJD P 18, 25-31) The record evidence shows that the Respondent wanted continuity in this operation and the ability to cancel the Launch Agreement if it was not efficient and cost effective, and ensured this by reserving the right to cancel the Launch Agreement at any time with a 90 day notice. The Launch Agreement was nothing more than giving the Intervenor a "try out" to see if their members had the skills necessary to make the DTF team. If this constitutes punishment, then such punishment is self-imposed.

**D. The Single Facility Unit is Appropriate. (Related to Respondent Exceptions 1, 4 8-9, 13, 16-17, 25-31, 45, 48, 50, 63, 65-75, 77-79, 81-83, 89, 93, 97-98, 100-102)**

**and..**

**E. Accretion of the transition employees to the Intervenor's unit is not appropriate. (Related to Respondent's Exceptions 2, 5, 8-9, 14, 48, 50, 65, 69, 74-78, 81-82, 86-89, 93, 97-99, 100-102).**

Respondent argues in Exception D that the multi facility Intervenor unit is appropriate because of the central control over daily operations and labor relations, including the extent of local autonomy; similarity of employee skills, functions, and working conditions; the degree of employee interchange; the distance between the locations; and bargaining history, if any, citing *Jerry's Chevrolet, Cadillac, Inc.*, 344 NLRB 689, 690 (2005). Respondent further argues that the "operational structures and practices" of Respondent significantly "differ" from the predecessor JIS, citing *P.S. Elliott Servs.*, 300 NLRB 1161, 1162 & n.4 (1990) (quoting *NLRB v. Burns Sec. Serv.*, 406 U.S. 272, 280 (1972)).

In Exception E the Respondent, while acknowledging that the Board follows a restrictive policy in applying the accretion doctrine, still argues that accretion is appropriate in this matter because integration of operations, centralized control of management and labor relations, geographic proximity, similarity of terms and conditions of employment, similarity of skills and functions, physical contact among employees, collective bargaining history, degree of separate daily supervision, and degree of employee interchange.

Respondent's arguments lack merit. Regarding central control over *daily operations and labor relations, from the employees' perspective which is the proper perspective*, the Respondent insisted through the Launch Agreement that current JIS "supervisory" staff remain to direct and control the daily operations and to provide direction to UAW Skilled Tradespersons. (GC 28, P 2, number 2) Transition employees had the same immediate supervisor Ron Sirhan, who directed their work, approved their time sheets and payroll requests and granted time off requests, all accepted indicia of supervisory status. (Tr 120, 160, 190-191, 237, 243-244, 396, 400, 449, 483-484, 487, 600-601) If Sirhan was unavailable, the transition employees would make these requests through their same manager Dave Maggard, who eventually replaced Sirhan

and assumed Sirhan's duties. (Tr 128,130, 195-196, 237, 243-244, 259) The transition employees received their same work orders from their same supervisor Knott. There was no change in daily operations or labor relations.

Regarding similarity of employee skills, functions and working conditions, the Launch Agreement prohibited any Intervenor unit members from working at the facility even for overtime without being properly trained. As ALJ Goldman noted:

“The UAW also argues that Local 245 engineers and electricians working throughout the R&E center have the same licenses and skills as those working in the DTF. This may be, but the record evidence is clear that Ford negotiated with the UAW to prohibit outside UAW Local 245 members from even filling in for overtime in the DTF unless and until they went through “training” or “systems familiarity” at the DTF. This training did not begin until early August and by the time of the hearing in November, at most 23 members out of 526 had gone through it. None have bumped into or been assigned to the DTF. This was a choice that Ford made. Indeed, Ford and the UAW agree that Ford has the discretion to assign whom it wants to the DTF. Ford chose to hire Jacobs employees because, it told the UAW, it “would feel more comfortable” with the former Jacobs employees. Ford negotiated to preclude outside Local 245 employees from bumping into the DTF unless they received training. What this shows is that DTF remained a distinctive unit, set apart by work skills and ability. This remained the case as of the time of the hearing”.

(ALJD P 18, L 25-36)

Regarding employee interchange, as previously noted, it was minimal. This included temporary training assignments, dispatches for two emergencies and a few small maintenance and safety projects, one lasting one hour. All of these assignments, with the exception of orientation training for the transition employees, did not occur until three months or more after the transition. (Tr 135-138, 155-158, 198, 202, 213-215, 221, 267, 411-412, 414-415, 442-443, 453-454, 459,489, 491,509-512, 544, 576, 586, 602-603 ; I 13 and I 14)

The distance between Intervenor worksites in this matter is also irrelevant:

“The proximity pales—indeed, it illustrates the inappropriateness of relying on it—compared to the case the UAW relies upon, Jerry's Chevrolet, 344 NLRB 689, 691 (2005), where a “salient” factor in rebutting the single-site presumption

was the contiguousness of three of the four sites at issue—with “no fences or barriers” separating them, with the fourth site directly across the road. That kind of proximity helps rebut a single site presumption, at least in the context of an initial representation unit determination. But a proposed multi-facility unit with most locations down the highway in neighboring cities is ineffective to rebut the single-site presumption, especially here, given the weight is to be accorded the historically-recognized unit.”

(ALJD P 18, L 15-23)

Respondent’s argument further ignores the Charging Party’s history of collective bargaining within the same geographic area, which includes 33 additional Respondent facilities that the Charging Party has unit members working in or at, and a 17year collective bargaining history at the DTF.

In addition, the cases relied upon by Respondent in Exception D, *P.S. Elliott Servs., Jerry’s Chevrolet, Cadillac, Inc., and Budget Rent-A-Car Sys., Inc.*, 337 NLRB 884 (2002), can be distinguished. In all three cases there is no launch agreement that restricts unit employees from working in their facility, or requires that the local supervisory structure from the predecessor stay in place. Nor is there any limit on the nature of the relationship between the parties, requiring the collective bargaining representative to remain cost effective and efficient or a provision that allows termination of the collective bargaining relationship with a 90-day notice.

Finally, the Board has found under similar circumstances that a single facility unit was appropriate. In *Bendix Transportation Corp.*, 300 NLRB 1170, 1172 (1990), the Board found that the successor employer had a duty to bargain with predecessor’s unit employees when it transitioned leased truck drivers in house. *Bendix* operated a fleet of more than 300 tractors and 1000 trailers from 21 terminals and domiciles in about 12 States, and transitioned drivers in

house from its Pennsylvania facility. The Board in affirming the Administrative Law Judge, found:

“The case is somewhat unusual, however, in that the Respondent here is assertedly a successor to its own former independent contractor, and the argument can be made that, under the precedents, the “employing industry” has changed: the “employer” of the present group of employees was Vanguard, a labor contractor, and the new employer is Bendix, a carrier. However, similar circumstances were present in *Saks Fifth Avenue*, 247 NLRB 1047 (1980), enfd. in pertinent part 634 F.2d 681 (2d Cir. 1987), where Saks leased space from Gimbels in Pittsburgh and also leased Gimbels’ employees to perform Saks’ alteration work; Gimbels employed alteration employees to work solely on clothes sold by Saks. When Saks moved its business to a separate location and hired most of its former Gimbels alteration employees, the Board found a successorship, holding, “Continuity of the employing industry requires consideration of the work done, which in this case continues to be alterations on clothing sold by Saks, as well as consideration of the work force.”

The Board further noted in *Bendix* that drivers essential work functions did not change because the drivers and classifications remained the same, and work assignments were made in the same manner and by the same supervisor. Although local drivers expanded their work radius from 50 to 100 miles, and some drove further to service new customers, and there were changes in where drivers stored their trailers and tractors, this was insufficient to change the drivers’ essential work functions. The Board further found that lack of access to shower or lunchroom facilities after moving to a new facility; a lower hourly wage for the road drivers; the increase in driver daily driving mileage; the denial to such drivers of the right to use toll roads; and requiring drivers to purchase fuel from a single source as opposed to the prior two alternatives, would not “change driver attitudes about being represented,” *Bendix Transportation Corp.* at 1173.

Accordingly, a single facility unit is appropriate under these circumstances at the DTF.

In regards to accretion, ALJ Goldman noted:

“..the Board finds accretion “only where the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are

accreted.” *E. I. Du Pont, Inc.*, 341 NLRB 607, 608 (2004), quoting *Ready Mix USA, Inc.*, 340 NLRB 946, 954 (2003). Thus, in this case, the successorship analysis finding that the historic DTF unit remains appropriate, leaves no room for a viable claim that the DTF unit has been accreted into a larger R&E Center unit.”

(ALJD P 21, L 7-13)

“Moreover, and obviously, the DTF maintenance work at issue was historically performed by IUOE employees working in a DTF-only unit. Thus, the UAW’s reliance on cases such as *In re Premcor*, 333 NLRB 1365 (2001), and *The Sun*, 329 NLRB 854 (1999), is fundamentally misplaced. Those cases involve situations where work that has historically been part of a unit was transferred and removed from the unit and assigned to a newly created job classification (and in *In re Premcor* to a new location). In such instances, the Board rejects the view that it is necessary to find that the transferred/removed work is an accretion to the unit. Rather, the transferred/removed work, even if placed in a newly created classification, remains part of the historic bargaining unit work. These cases add exactly nothing to the UAW’s case here. The Ford DTF maintenance employees are not performing work that was transferred or removed from the preexisting UAW-represented bargaining unit. The UAW’s suggestion that a newly hired Ford employee in a newly acquired location, who performs the same type of work as a UAW-represented employee, necessarily becomes a member of the preexisting UAW-represented bargaining unit, without even the need to satisfy an accretion analysis, is an argument invented out of whole cloth.”

(ALJD P 22, L 4-18)

The bargaining unit work in question belonged to the Charging Party’s existing unit at the DTF for 17 years. Accordingly, accretion is not appropriate under these circumstances.

**F. The ALJ’s remedy is appropriate. (Related to Respondent’s Exceptions 100-102).**

Respondent excepts to the remedy and proposed Order in the ALJ decision. Respondent’s exceptions are without merit.

Section 10(c) of the Act states<sup>18</sup> in part:

“If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act; Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: ... Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order”.

The Supreme Court has stated with respect to remedies that "Congress has invested the Board, not the courts with broad discretion" to fashion remedial orders. *NLRB v. Food Store Employees Union*, Local 347, 417 U.S. 1, 8 (1974). Section 10(c) leaves the Board with "broad discretion to devise remedies ... subject only to judicial review." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). The Supreme Court has further stated that it will not disturb a remedy ordered by the Board "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). The Supreme Court has also stated that Congress could not define "the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

ALJ Goldman's remedy and Order requests that the Respondent cease and desist from engaging in unlawful conduct, recognize and bargain with the Charging Party, and post

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<sup>18</sup> 29 U.S.C. 160(c).

appropriate notices. The remedies are standard Board remedies under Section 8 (a) (5) and should be granted by the Board.

#### IV. CONCLUSION

Based on the above and the record as a whole, Counsel for the General Counsel respectfully requests that the Board find that Respondent Employer violated Sections 8(a)(1) and (5) of the Act as alleged in the Complaint as amended and deny Respondent's exceptions in their entirety.

Respectfully submitted this 7<sup>th</sup> day of May 2018.

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**CERTIFICATE OF SERVICE**

I certify that on the 7<sup>th</sup> day of May, 2018, I e-filed **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO THE RESPONDENT'S EXCEPTIONS**, and served a copy electronically on the following parties of record:

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