OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1208

TITLE FALL RIVER DYEING & FINISHING CORP., Petitioner
v. NATIONAL LABOR RELATIONS BOARD

PLACE Washington, D. C.

DATE March 2, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

FALL RIVER DYEING & FINISHING CORP.,

Petitioner,

v. No. 85-1208

NATIONAL LABOR RELATIONS BOARD

Washington, D.C.

Monday, March 2, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

IRA DROGIN, ESQ., New York, New York; on behalf of the Petitioner.

LOUIS R. COHEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning in Number 85-1208, Fall River Dyeing & Finishing Corporation versus National Labor Relations Board.

Mr. Drogin, you may proceed whenever you are ready.

ORAL ARGUMENT OF IRA DROGIN, ESQ.

ON BEHALF OF THE PETITIONER

MR. DROGIN: Mr. Chief Justice, and may it please the Court:

This case involves the issue of whether and under what circumstances an employer, purchasing the assets of a defunct business enterprise, must recognize a labor union which represented the employees of its predecessor, the former assets owner.

It is to be distinguished immediately from those cases in which a going business was purchased, substantially intact and operational, and in which the new owner retained or quickly employed a majority of the employees of the former assets owner.

This Court must decide --

QUESTION: -- heard enough of the employees of the former owner, that a majority of his present employees are those?

MR. DROGIN: That is correct, Your Honor. Eventually that occurred. That occurred at two different time periods and I am going to get to that if I may.

This Court must decide whether Fall River should be considered a successor for the purposes of collective bargaining when the employees of its predecessor constituted a minority of all of the employees of Fall River at the full complement date, but also when the employees of the predecessor constituted a majority at an earlier date, the substantial complement date.

We have some guidance from this Court in how to approach this particular issue, and if I may quote very briefly from the opinion of this Court in Howard Johnson: this Court held that the real question in each of these successorship cases is on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative.

The answer to this, according to this Court, requires an analysis of the interests of the new employer and the employees, and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether

it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, et cetera.

QUESTION: Mr. Drogin, I take it that in general we have concluded that NLRB findings of fact are going to be treated as conclusive unless they are not supported by substantial evidence. Do you agree with that as a general principle?

MR. DROGIN: I certainly do, Your Honor.

QUESTION: All right. Now, what are the legal issues if any that you think are in this case? Are you asking us to change some legal standard that the Board employs, the substantial and representative complement test or anything of that kind?

MR. DROGIN: I am, indeed, Your Honor. I think that the substantial and --

QUESTION: It isn't clear to me from your petition and the statement of questions whether we are being asked to review the case to find out if there is substantial evidence, or if you are asking us to employ a new legal test or standard in these cases.

MR. DROGIN: I think the answer is both. I think that there is no rational basis for the decision of the Board here, and I am also --

QUESTION: You mean, there is no substantial evidence?

MR. DROGIN: That is right. I think that there is --

QUESTION: So, you are asking us to make a factual determination?

MR. DROGIN: Yes, I am, Your Honor. I am asking that. I think that the legal issues deal with the interplay of three specific propositions.

They are the fact that the Board here has applied the substantial and representative complement test, completely ignoring what this Court said in Burns, that there may be situations at which the time for determining the majority status of the employees involved in the successor may not be available, or may not be appropriate until a full complement of employees has been hired.

In this situation, we had --

QUESTION: Well you think we should adopt a rule that you only -- you time the inquiry when there is a full complement of employees rather than a substantial and representative complement?

MR. DROGIN: Yes, in a slow build-up situation. Most of the cases that this Court has had before it, Wiley, Burns, Howard Johnson, involve situations where the unit was taken over virtually intact with virtually all of the employees, and there

was no hiatus involved.

This case differs substantially, factually --

QUESTION: May I ask, just so I understand your position, assume you have a takeover of the assets and no employees, and you add 20 employees a month until you get up to the full complement. And when you've got, say 75 percent of the employees, say it's perfectly clear that they're all union members and they're all former employees, would you say there is no duty to bargain until you have the full complement?

MR. DROGIN: I would think that you have to determine at the outset what the employer's plans are and when the full complement --

QUESTION: Well, I would assume the plans are to keep hiring until you get the full complement, but you won't have that done for another three or four months. Are you saying there is no duty to bargain until that three or four month period?

MR. DROGIN: In a situation where there is a slow buildup, and particularly, Your Honor, in a situation such as here where there is no rational or factual basis for the underlying presumption that the --

QUESTION: Well, but that's a separate question. I was just trying to isolate the question about the point at which you measure the right to have

-- the union's right to have the employer bargain with it.

And you say, you just don't even begin to have a duty to bargain until there is a full complement, even if they are all former union employees and former employees of the prior owner?

MR. DROGIN: Unless, Your Honor, the takeover is a takeover of a going business --

QUESTION: Right. I understand.

MR. DROGIN: -- virtually intact, virtually the entire labor force, but not in a slow buildup situation where there is an assets purchase.

QUESTION: Yes, but if he's 75 percent -- he has 75 percent of his complement and all of them are prior employees, when he gets to be a full complement there is still going to be a majority of the former employees.

MR. DROGIN: Well, that's an assumption. That assumes that if that 75 percent --

QUESTION: You mean, he's not going to fire anybody? He's not going to fire anybody?

MR. DROGIN: Certainly not. But you have to accept an assumption --

QUESTION: But in this case, in this case it was possible but not in the example I just gave. In

this case it was possible that when it reached the full complement there would not be a majority.

MR. DROGIN: That is correct. It is possible.

The problem in this case is that there is an underlying assumption here that at the time of the demand, at the time that the demand was made at this case, and the time that the measuring period was applied, in this case by the Board, the substantial complement date which was seven months at least from the time of the closing of this plant and the laying off of 150 employees, that representation wishes of the former employees of Sterlingwale had not changed and that is completely unsupported by the record.

This Court has always been concerned with the paramount principle of the National Labor Relations Act, and that is the policy of majority representation. It has been concerned that employees are not bound by a representative, a majority of them, by a representative not of their own choosing.

And in this situation, quite different than Burns, there was no recent certification. In the Burns case there was a certification of the bargaining representative only three months before the takeover.

Here, not only was there no certification but over a bargaining history of more than 20 years, there

is no evidence in the record that there was recognition based on any showing of majority support. The assumption, or presumption that we start with a majority in this time carryover rests entirely on a collective bargaining agreement which has a union security provision which requires all employees to be members of the union 30 days after their employment.

QUESTION: Mr. Drogin, I take it from your remarks that you do not expect -- you are not asking us to overrule Burns?

MR. DROGIN: Certainly not. I think, however, that one of the concerns of Burns was the implicit assumption with regard to representation. That there is a carryover that every employee in the predecessor employer's employ who was a member of the union still wants to be represented by that union seven months, ten months, 11 months, however many months afterwards in this type of situation that person is employed?

QUESTION: What's the cutoff date for -- you would abandon this argument if there had been a union certification election within a year, within a year before what?

MR. DROGIN: Within a year before --

QUESTION: A year before the transfer of ownership, or --

MR. DROGIN: Not the transfer.

QUESTION: -- within a year before the full complement?

MR. DROGIN: Before the full complement, Your Honor. I would think that the full complement date in a slow buildup situation is the appropriate date.

I think that's what this Court had in mind in Burns when it said that there may be situations and circumstances in which it's not evident until a full complement has been employed, that the union does have majority --

QUESTION: Is there any way that a union can protect itself under your theory without holding an election every year?

MR. DROGIN: Well, certainly, Your Honor. The union is protected by certain presumptions that, for example, one year -- there are no representation petitions to be filed one year after its certification. Its contract protects it for a period of time afterwards, and there is a continuing presumption --

QUESTION: They had a contract here?

MR. DROGIN: Yes, and that is quite interesting, Your Honor.

QUESTION: I thought you said they had to have had, within a year, a certification.

MR. DROGIN: That is what this Court said in Burns.

QUESTION: Is that what you say?

MR. DROGIN: I think that that's the proper rule.

QUESTION: That in this case they should have had an election every year?

MR. DROGIN: No, not every year, Your Honor.

QUESTION: How could they have protected themselves?

MR. DROGIN: Well, it's not a question of the union protecting itself. That's not the interest that we are seeking to protect. The interest that the statute has us protect is the right of employees to be represented by a union of their choice.

QUESTION: Well, how can employees do it, other than to every year challenge the union?

MR. DROGIN: Well, here, Your Honor, we have a very unusual situation.

QUESTION: You sure do.

MR. DROGIN: Because the union, for all intents and purposes, was gone from the picture. After its contract expired in April of 1982 --

QUESTION: You're going behind the contract, then.

MR. DROGIN: Pardon me, Your Honor?

QUESTION: You're going behind the contract, then.

MR. DROGIN: I'm not going behind --

QUESTION: Are you telling me that the contract doesn't exist?

MR. DROGIN: That is a factual statement. That is correct. The contract expired on April 1st, 1982 and there was no attempt to renew it by the union because the employer, Sterlingwale, was being liquidated.

It was defunct. It was selling off its assets. It was a dead, moribund company and that is the distinguishing point between this case and Burns and Wiley and Howard Johnson and Golden State.

In those situations there was at least an expectation, an immediate expectation on the part of the employees of the former employer that there would be some kind of carryover of bargaining representative.

QUESTION: Mr. Drogin, I have been thinking about your answer to my previous question. I don't see how it can work.

You want the year to be measured from the full complement date, but you don't know when the employer is going to reach a full complement until he finally reaches it. So, what do you do in the interim? You are

in absolute indecision.

You don't know whether you have to deal with the union or not. It can't be -- it surely can't be the full complement date. You must mean the anticipated full complement date.

MR. DROGIN: That is correct, Your Honor, correct, and in this particular case that was not hard to determine because the employer had immediate plans. His plans worked. He stuck with those plans.

The job required that two shifts be put on as the business increased. The employer projected an April full complement date. That is exactly the way that it worked, with a slow and gradual buildup.

Now, it is argued that the union doesn't know, or how can the union know. The answer to that is, all they have to do is ask and there is nothing that prevents the employer from giving this information to the union.

If they refuse, if the employer refuses, which would not be the case in this situation, then certainly the union can file a representation petition with the National Labor Relations Board and in the Board's investigation and procedures, that information is going to be forthcoming.

So, there is no prejudice to the union.

QUESTION: Mr. Drogin, to change the subject a little bit, what percentage of the business of the new company is with customers of the old company?

MR. DROGIN: Including the parent company of Fall River, slightly more than 50 percent. Excluding the parent company, it is about 30 percent. However, there is no real way of determining how much of that was finishing customers and how much of that was converting customers.

QUESTION: Did the new company carry forward both aspects of the old company's business?

MR. DROGIN: Absolutely not, Your Honor. The new company is strictly a finishing company, does no converting work at all. The old company was doing approximately 70 percent converting work, approximately 30 percent finishing work.

The new company made no attempt to acquire any of the customers, the finishing customers, that 30 percent of the old employer, didn't ask for any customers list, didn't take over any trade name, did nothing other than purchase the physical plant and machinery.

It made no attempt whatsoever to continue the business of Sterlingwale.

QUESTION: May I ask you a question about the

bankruptcy sale. Was the new company the only bidder?

MR. DROGIN: I don't know the answer to that, Your Honor, I have to tell you.

QUESTION: If would have to be the high bidder under your law, would it not?

MR. DROGIN: Under the Massachusetts law, I would assume that it was. However, your question poses a very interesting secondary question.

In addition to the sale of the secured interests, which was the real estate, the plant and the equipment, there was also a sale of the remaining unencumbered assets of Sterlingwale and in that situation there were outside bidders, and as a matter of fact Fall River acquired only about one-third of those assets.

QUESTION: If I recall correctly, Fall River was formed for the very purpose of buying these assets, wasn't it?

MR. DROGIN: I disagree with that, Your Honor. That is what the Board argues, that it was formed for that --

QUESTION: The Board found.

MR. DROGIN: Pardon me?

QUESTION: The Board found. Did the Board argue that, or did the Board find that?

MR. DROGIN: The Board argued it, that it was formed. They argued it in their briefs. I don't believe --

QUESTION: That was not part of the findings of the Board below?

MR. DROGIN: That's not my recollection, that it was formed for that purpose.

QUESTION: If it was part of the findings, of course we'd have to defer to it unless there was no substantial evidence.

MR. DROGIN: That's correct. What happened is uncontroverted, and that is that the principal, Mr. Friedman of Fall River, had nothing to do with Sterlingwale other than being a customer himself until the end of August 1982 when he was approached by the attorneys and other persons who held the security interest in the assets.

QUESTION: I thought there was an officer of the defunct company, who also went in it with him, isn't that --

MR. DROGIN: That is correct.

QUESTION: The vice president?

MR. DROGIN: He did, but at the time in late August 1982 --

QUESTION: And the two of them formed this new

company, is the way the Board describes it.

MR. DROGIN: Well, I think that's a bit of an overstatement, when you say that they formed the company. Mr. Friedman actually formed the company. He is the sole shareholder.

Mr. Chase at that time had been working in New York for a competitor, a competitor of Sterlingwale. Sterlingwale was defunct. The record shows that the company was formed, I believe on August 31st. That is when the Certificate of Incorporation was filed.

All of these things happened simultaneously, and the documents in the record indicate -- it's a rather complex situation there -- that Fall River had the right to acquire these assets at a particular price. And what we have here, really, is an assets purchaser, not interested in the employees as employees.

Fall River made no attempt to go after the employees of Sterlingwale. It didn't obtain their personnel records. It didn't obtain any lists of where to locate them.

When it needed employees it advertised in the newspaper and that's where it got its employees. It also hired employees of other finishing companies in the Fall River area. And this distinguishes this case very, very much from cases such as Howard Johnson and Burns.

Here, after employees, 150 production employees being out of work with no real anticipation of ever being rehired, they see a newspaper ad from a completely new employer and that's how they became part of the personnel of Fall River.

I think I would like to make a point here about the representation wishes of the former Sterlingwale employees, because again this lies at the heart of the Act.

What happened in this situation was that when Sterlingwale went out of business it owed premiums for life insurance and health insurance for the bargaining unit employees. It hadn't paid them, and any of those employees who wanted to continue that coverage had to pay it for themselves.

It also didn't pay severance pay. It also didn't pay vacation pay. In the interim, in the several months while Fall River was -- excuse me, while Sterlingwale was in control, money came in.

The Sterlingwale Company was undergoing a slow liquidation and the money was used to pay taxes and other creditors, and even when the assets were sold at the end, the unencumbered assets at the end of August of 1982, none of that money went towards paying the employee benefits.

So, in the following year when the National Labor Relations Board hearings were coming up the employees, the former employees of Sterlingwale heard about this and they repudiated the union. Factually, without any presumptions being used, they repudiated the union and they had the former secretary -- I shouldn't say the former -- the secretary of the union circulate two petitions, one to former Sterlingwale employees and one to new employees who were non-Sterlingwale employees.

Those petitions are part of the record, and they say clearly that those employees do not want to be represented by Sterlingwale -- pardon me, by the union. And the reason is very clear from the record. The reason is that the union did not get the employees the benefits that belonged to them under the contract.

That is a very good reason for repudiating a union, and that right is guaranteed. That's the policy of the statute, that employees have the right --

QUESTION: How did the Labor Board deal with this argument?

MR. DROGIN: Well, the Labor Board -- apparently unfair labor practice charges were filed with regard to these defaults in payment, and those charges were dismissed because it was not a repudiation, I think is the test that the National Labor Relations Board uses.

Unless there is a repudiation of the contract, the Labor Board won't issue a complaint with regard to failure to pay insurance benefits or contributions to employee benefit funds. That's their present policy.

So, they were dismissed but they were never pursued to arbitration and there was money there. There would have been money available had the union acted promptly and the employees --

QUESTION: I'm just a little puzzled as to what the proposition this argument is directed to -- what proposition of the law does this support?

MR. DROGIN: The proposition that I am addressing this to, Your Honor, is that the fundamental policy of the Act is the protection of employees' rights to be represented by a union of their choice. In this situation we have a noncertified union. We have no showing --

QUESTION: But they had been recognized for 20 or 30 years, hadn't they, as the bargaining agent of these employees?

MR. DROGIN: That is correct.

QUESTION: Does that give them a different -- a lesser right to bargain on behalf of the employees than if they had been certified just more recently?

MR. DROGIN: Well, that's the whole question,

whether Fall River is required under these circumstances to bargain with this union under the successorship theory. Their bargaining demands, the union's bargaining demands, is concededly an unlawful demand, because it was based on the old contract.

This Court clearly said in Burns that even if there is a successorship finding, that the successor employer is not bound by the old contract. Nevertheless, that's what happened here.

QUESTION: Mr. Drogin, didn't the Board consider the expression of displeasure with the union that you are referring to, and didn't the Board think that that could be explained on a quite different basis; to wit, that these people weren't approached until quite late on and they thought that if the old union were certified and went ahead with its unfair labor practice complaint, they wouldn't be able to get a wage increase for the next few months?

Didn't the Board consider that and didn't it make that factual finding?

MR. DROGIN: I don't know if they made that as a factual finding.

QUESTION: Well, this is a credibility point, isn't it? How can we second-guess the Board on credibility?

MR. DROGIN: Well, Your Honor, I don't think it's second-guessing them on a credibility finding. I think it's evidence, and there was record evidence from the Secretary of the Union at the hearing with regard to the changed sentiments of the members of that bargaining unit.

QUESTION: But they chose not to believe them, and they thought that the explanation for all the signatures disapproving the union that they got was was simply that the people thought if they approved the union they wouldn't get a wage increase because an unfair labor practice complaint would be in the works.

MR. DROGIN: I think the reason that was applied, Your Honor, and this was approved by the Court of Appeals, was that the timing of the petition would not allow -- or the petitions, rejection petitions, would not allow -- was improper because the Board and the Court said that the petitions had to have come to the attention of the employer before the substantial complement date and because they arrived after that, yet before the full complement date, that they were irrelevant and had no bearing on the issue.

I think that was the basis for rejection of that evidence.

QUESTION: You made the point in your main

brief that it's very important to have some certitude for the employer as to when the test of majority favoring the union or not is to be applied. The Board responded, you don't need certainty because there is really no harm done. If the employer makes a mistake he won't get hit with a penalty anyway.

What harm is done?

MR. DROGIN: Well, I think that, Your Honor, the harm that's done is that the employer is found to have violated the National Labor Relations Act, which we consider a violation to be a very serious thing.

QUESTION: If there is no penalty imposed, are there any other legal effects of that finding?

MR. DROGIN: Well, there is no monetary fine, of course, that can be considered by the Board in further unfair labor practice proceedings with regard to the remedy that may be applied. Should Fall River be found to be a violator of the Act, again the prior record is important.

Your Honor, we don't want a suspended sentence, so to speak. It is our contention that we didn't violate the law and we shouldn't be placed in a position where because of the uncertainty of the substantial complement test we don't know what to do on a day to day basis.

The Board itself says that there are no hard and fast rules for determining when a substantial complement has been employed. The Board admits this in its brief. How is an employer to organize its business affairs under these circumstances? This imposes a very unfair burden on an employer, particularly one who is an assets purchaser simply trying to operate a new business.

I would like to reserve some time for rebuttal, if there are no further questions at this time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Drogin.

We will hear now from you, Mr. Cohen.

ORAL ARGUMENT OF LOUIS R. COHEN, ESQ.

ON BEHALF OF THE RESPONDENT

MR. COHEN: Thank you, Mr. Chief Justice, and may it please the Court:

The union selected by the members of an appropriate bargaining unit is ordinarily presumed to continue to represent the unit unless and until there is either an employee petition to the Board for a change, or the employer can demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status.

The reason for this indefinitely continuing presumption, as the Court re-emphasized last term in the

Financial Institution Employees case, is that after the initial selection the law greatly prefers stable and continuous collective bargaining to management electioneering, and that it therefore generally bars re-visiting the representation issue unless and until there is affirmative reason to believe that the union no longer commands majority support.

The question, whether changes in ownership of the employing enterprise affect the presumption of continuing representation was answered in general terms a long time ago. Under a well-established Board rule approved by this Court in Burns, a change of ownership does not affect the presumption if there is substantial continuity in the employing enterprise and the definition of the bargaining unit remains substantially the same, and a majority of the successor's employees in the unit came from the predecessor.

The opinion in Burns does refer more than once to the fact that there had recently been an election in the predecessor unit, but I think that none of the weight of the Burns decision can rest on that fact.

QUESTION: Mr. Cohen, isn't the expectation of an imminent expansion in the number of employees a factor to be taken into consideration in applying the Board's substantial and representative complement

approach?

MR. COHEN: Yes.

QUESTION: And shouldn't it be a factor, if it is known that there is going to be a significant expansion in the number of employees? Isn't that something the Board should take into consideration in applying the test, when you have one of these successor employer situations?

MR. COHEN: Yes. The Board's test for substantial and representative complement is whether the operation is in substantially normal -- the enterprise is in substantially normal operation and the positions have been filled, and the Board says that it also takes into account the number of employees --

QUESTION: All right.

MR. COHEN: -- and the likelihood of expansion.

QUESTION: All right. Let me tell you what troubles me about the Board's action in this case, because I would appreciate your discussion of it.

Fall River expected, and it was known that it expected to double the number of its employees from about January until April, it planned to go to a double shift. Now, the Board seemed to look at this situation as though it were frozen in time about the end of January, and given the fact that it is known that within

quite a short time they expected to double it, do you think the Board really took that factor into consideration the way it should have?

MR. COHEN: Yes, I do.

QUESTION: I think these are troublesome cases, and the reason they are troublesome is because the employer is in a dilemma here about the timing of when he is forced -- or when the employing unit is forced to look at the situation of a representative and substantial complement.

MR. COHEN: First, I think the Board did properly take the facts into account here. Let me start with the numbers.

On January 15, 1983 when the Board determined that there was a substantial and representative complement, 36 out of 55 employees had come from Sterlingwale. As of April 22 when the petitioner says that it had completed its hiring, by my count based on Exhibit GC-8, 52 or 53 out of 107 employees in the unit had come from Sterlingwale.

The Board concluded that petitioner, having started up in September and having had at all times thereafter until late in March an absolute majority of employees who had come from Sterlingwale, and being -- and this is a finding of fact -- in normal operation of

a full shift, and saying that it was starting a second, but here is Mr. Chase's direct testimony on that point.

He says at page 208 of the Joint Appendix: "Our plan was to have one full shift operation of 55 to 60 employees and after we reached that goal then we'd see how business would be and then we had planned that by the end of March, April, we should be in a full two-shift operation."

The Board said: "Looking at the problem from the perspective of January 15, the employees were entitled to be represented on that date when the business was up and running."

QUESTION: Well, are you just saying the Board didn't have to give credence to the fact that they planned a second shift, that the Board's decision can be supported on the ground that they didn't have to accord credibility to the plan of a double shift?

MR. COHEN: No. I'm saying that the Board didn't have to treat the plan as firmer than Mr. Chase testified that it was. The notion that there is a neat objective, defined in advance, that the petitioner was always aiming at and which it had only achieved part of in January, is largely an afterthought, rather, as in most of these situations in real time, the employer is --

QUESTION: Yes, but when was the Board looking

at -- the Board wasn't looking at it. In fact, they held a hearing when, long after this had happened?

MR. COHEN: No. The hearing was at the beginning of May.

QUESTION: Well, by then they knew that a shift, a second shift had been added, so why weren't they interested in looking at what really happened?

MR. COHEN: They were looking at, first, the fact that there was at all times very substantial continuity in the bargaining unit -- even as of May 2nd there was, as I say by my count they were only a half a Sterlingwale employee short -- but also at the fact that as a successor employer starts up, its ultimate objection, and whether it will get there may not be clear and the operative rule for employers and for unions ought to be that when the enterprise has reached substantially normal operation the employees are entitled at that point to a determination of their right to be represented.

QUESTION: If the Board had looked at the situation as of mid- or late April, would it have still been able to find at that time that this union should have been recognized?

MR. COHEN: The Board's rule is that it looks for a majority of a substantial and representative

complement and on April 22, as I say, there was slightly less than a majority. But let me also --

QUESTION: I agree with you, Mr. Cohen, that there ought to be a clear rule, that the employer ought to know and the Board ought to know. Aren't there consequences beyond the mere moral opprobrium of being cited for an unfair labor practice if the employer doesn't know whether he yet has a substantial and representative complement?

For one thing, isn't it the case that if he fails to bargain with the union wrongfully at that ineffable moment, whatever it is, he won't be able to have an election for the next -- what is it, the next year, because he will be deemed to have interfered with the normal process?

MR. COHEN: That may be. I'm not sure that that is true, that that is true in this case. But I also think that this is --

QUESTION: If we're not sure about it, then you know, your brief says no big deal, if the employer makes a mistake as to when that magic moment of a substantial and representative complement arrives, nothing happens except he is cited for an unfair labor practice.

Now, you say it may well be that in addition

to that he will not be able to have an election in that year, for another year because of his good faith failure to realize when the magic moment has come. That's pretty substantial.

MR. COHEN: I don't think that the employer is, in fact, in any such puzzlement. He knows that he has taken over a predecessor employer and he knows that he has so far hired a substantial -- a majority of his employees from the predecessor's rank and file, and he knows that he is in --

QUESTION: Do you know as of what time that is being measured?

MR. COHEN: And he knows that he is in substantially normal operation and he knows that he has filled --

QUESTION: What is substantially normal operation -- what does "substantial" ad "representative complement" mean? Representative of what? Representative of --

MR. COHEN: I was going to say, he knows that he has filled the various positions, staff positions that he has. "Representative" means having some employees in each -- or substantially all employee categories.

QUESTION: Such categories as what, supervisor

versus non-supervisor, or --

MR. COHEN: Such as cutter versus finisher versus -- not supervisor versus non-supervisor, but the categories of rank and file employees here, people who work on different machines, work on different parts of the process.

QUESTION: You mean, if it wasn't just a separate -- another shift of the same operation that was going to be added here but rather a whole separate operation?

MR. COHEN: Yes. This is --

QUESTION: Then you wouldn't have had a substantial representative complement?

MR. COHEN: You might not. You might --

QUESTION: Maybe?

MR. COHEN: This is --

QUESTION: Yes or no, would that alone have been enough to make it clear that it was not a representative complement? The fact that the other half of the business he was going to add was a totally different element of the business, it wasn't finishing -- what was the opposite of finishing, finishing and -- whatever the other one was.

MR. COHEN: Converting.

QUESTION: Converting, whatever it is, would

that have prevented it from being a representative complement? The thing is, I have no idea what the Board means by a representative complement, and if I don't, I don't know how an employer does.

If he doesn't, I think he is put at a very unfair risk.

MR. COHEN: This was an employer who, but mid-January, was engaged in one full shift of what he wanted to do, a finishing and dyeing operation. He had hired employees in all the categories of work that needed to be done in that shift, and the employer had reason to know that he was in business.

It is true that he was going to see how business would be, and had plans to add a second shift. But if this had been an initial representation situation, I think the Board under well and long established Board cases, would have said it is appropriate for the employees who are working on this first shift to be entitled to have a representation determination now and not wait until the employer says that he has hired --

QUESTION: Well, would you say that either in this case or in an initial representation case, if no one disputed that the employer was going to add a second shift? Let's assume the Board found he was going to add

a second shift but nevertheless we order bargaining because a majority of the first shift are old employees.

MR. COHEN: I think that might depend on how long it would take and how certain it was, which isn't --

QUESTION: All right. I'll just add another fact. By April there is going to be a second shift, or by March there is going to be a second shift.

MR. COHEN: I think that the Board, in weighing the right of employees to be represented during a critical point in staffing up against whatever considerations favor waiting for the ultimate electorate to be formed, might well say employees have the right to be represented on the way up, even if it clear --

QUESTION: If that is your position, the Board's position, I can't imagine that if it so turns out, when the second shift is completed, that these old employees are a distinct minority, can't imagine that the employer would be foreclosed from asking for an election.

MR. COHEN: In this case --

QUESTION: Just take my case.

MR. COHEN: I think that the employer may, in your case or in this case, when presented with concrete evidence that the union no longer commands majority support, seek to have the --

QUESTION: No bar, no bar, no time bar on it. When he gets his second shift completed it's perfectly clear that, to him at least, that a majority of the employees are not from the old employer and a majority of the employees, as far as he can tell, don't want a union.

Now, can he then, right then, even though he has -- even though the Board has ordered him to bargain with the union at that earlier stage, can he then immediately ask for an election?

MR. COHEN: Yes, if he bargained with the union -- .

QUESTION: Will he get it?

MR. COHEN: -- at an earlier stage, and he will get it if he can present to the Board concrete evidence of a loss of support.

QUESTION: Well, you say loss of support. Would the facts of Justice White's hypothesis amount to a loss of support?

MR. COHEN: Our position is that there is a presumption, and that the presumption carries over to the new employer in a situation like this, but that where there is no recent election as there had been in Burns the employer may immediately rebut the presumption after -- whenever it appears that there is no longer

majority support in the bargaining unit for the union.

QUESTION: May I ask this question, a hypothetical before you carry on? Let's assume, for example that when the old company went out of business, there were some entrepreneurs not connected with the old company who thought, "Well, there are some customers out there who need to be served. The old company had old equipment. We can buy new equipment and perhaps serve them more economically."

The new company then advertised in the newspaper for employees. It made no particular pitch for the employees of the bankrupt company. What would be the situation then with respect to the duty of the new company to bargain with the old, defunct union?

Let's assume further that in response to the advertisement, the new company ended up with a majority of its employees who were members of the old union and had worked for the old company.

MR. COHEN: I think --

QUESTION: If all you had was continuity of employees that resulted from public advertising?

MR. COHEN: Well, I think that under the Burns case, that is essentially -- that the Burns case covers that and that the Burns case tells us that there is sufficient continuity there. But that is not this case.

QUESTION: But is all you need continuity of employees without regard to any other facts?

MR. COHEN: No, the Board has a seven-factor test and as to each of the seven factors which have been endorsed by this Court, there was either total or very substantial continuity here.

Here the continuity was deliberate. Fall River was founded by a major customer and a vice president of Sterlingwale. They bought the production facility and the machinery in it in a single contract and not on the open market and not via foreclosure, except that there was a foreclosure sale to see whether there would be a higher bidder for the equipment.

But there is a contract which appears at page 238 of the Joint Appendix among the founders of Fall River Dyeing and Mrs. Anson, the widow of the founder of Sterlingwale and the creditor who held the mortgage on the production building and the creditor who held the mortgage on the machinery and equipment in that building, and by contract they bought it all.

Then they hired 12 supervisors, 11 of whom had been Sterlingwale employees, and they hired them by calling them on the telephone, according to Mr. Chase. Those supervisors then selected rank and file, and Mr. Chase said each department supervisor basically knew the

workers or knew the operation, and on their recommendation we did the employing.

This was a deliberate replacement of the Sterlingwale commission finishing operation, not its converting goods for its own account operation, but everyone including Mr. Anson testified that as far as production was concerned there was no difference between the two. It was a deliberate continuation of the earlier operation with employees --

QUESTION: Mr. Cohen, I understand you are saying this case is not the same as Justice Powell's hypothetical, but how did you answer his hypothetical if the employees had come in, in response to newspaper ads but you got 60 percent of them, were former employees? Would the result be different?

MR. COHEN: I think that the result is not different if you end up with all the pieces together the way they are here, even if it is by accident, in part because the theory is not that the successor employer inherits obligations of its predecessor because of some relationship it has to the predecessor.

QUESTION: So, for this purpose we can just look at the numbers and we don't have to get into the details of how they happened to get hired?

MR. COHEN: Or the Board could and the Court

of Appeals could determine that the Board's finding of continuity here was supported by substantial evidence.

QUESTION: Let me ask you one other question about the fact that in -- I get the dates a little mixed up -- in January they knew they were going to the full complement in April.

Did you answer Justice Scalia's hypothetical about, instead of just having more people doing the same thing, they were going to add -- instead of finishing and dyeing they wanted to go to converting or whatever the other -- go from one kind of fabric to corduroy, but the addition was of a different character than what they had at the time.

Would that be a different case?

MR. COHEN: I think that it could well be a different case because it might not be a representative complement of employees. If, on the other hand -- if on the other hand it was agreed as it was agreed here that the operation --

QUESTION: Just more of the same?

MR. COHEN: Was more of the same and that the same bargaining unit definition stipulated that the same bargaining unit definition was appropriate for the successor employer here as for the predecessor --

QUESTION: Is that what "representative"

means, representative of the various bargaining -- see, "representative" means nothing to me unless I know what it's representative of, representative of the age that all the employees are going to be, or their races or of their skills, of what?

MR. COHEN: I am sorry, I tried to answer before. It means representative of the various jobs that are within the bargaining unit definition, so that you have some employees who are doing each of the things that the bargaining unit will -- is expected to do.

QUESTION: Whether or not the jobs are all in the same classification as far as representational obligations are concerned?

MR. COHEN: Well, I am not sure I understand your question.

MR. COHEN: Well, you might have a number of quite different jobs in the same bargaining unit, may you not?

MR. COHEN: Yes.

QUESTION: Okay. So, it doesn't hinge on, representative of the various --

MR. COHEN: This case would be quite different if there were any question whatever about the appropriateness of the definition of the bargaining unit, but there isn't. In this case it's agreed that

it's the same definition as had applied before, and the question is, do we have enough people in the unit and are they sufficiently representative, and is the operation in sufficiently normal status on January 15th so that it becomes appropriate to say, are the employees entitled to representation today or not.

The question would be essentially the same, whether the determination is made by counting the number of employees who carry over from the predecessor, or is made by an election, and the importance of ordering bargaining to begin at about that point is that the employees' rights to be represented at all would otherwise be postponed through what is a critical period in the enterprise until the employer says, yes, indeed, I have now finally hired my last employee, now let's count.

Let me say just a word on the issue of the continuing demand. Actually, before I do that I want to say a word about the employee petitions here. The petitions which were put together on April 29, three days before this hearing, were quite clearly identified in the testimony as having been produced by a fear that this very proceeding would take three years and that the employees would not get a raise until it was over.

In addition the ALJ properly rejected those

petitions on the ground that petitions signed on April 29 did not have a bearing on the issue that was before him, which was the obligation to bargain as of January 15th. The Board's treatment of the union's demand as a continuing one, and as therefore outstanding on January 15 was, I think, correct as a matter of fact in law.

There is no doubt in anyone's mind, was no doubt on January 15th that the union was in fact still demanding recognition. There is no reason to require a union to keep sending demands as the employer staffs up. And there is nothing wrong with the Board's sanctioning a procedure under which the union makes a demand when the employer starts operations, and that demand, if not ripe at the outset, attaches whenever the employer who is in the best position to determine the facts has achieved the requisite complement of employees, if the requisite continuity of both the enterprise and the bargaining unit are then present.

The employer can, I repeat, and is in the best position to determine when he is in substantially normal operation and has a representative complement as it has been defined. The suggestion in the briefs that he has to worry about jumping the gun in that situation seems to me to be -- and suffering an 8-A-2 violation seems to me to be farfetched and there never has been an 8-A-2

charge in any such situation, recognizing the union that had represented the employees of his predecessor and there is a majority in the unit at that time.

And there is, with the tolerable certainty that is the best we can expect in any such situation, I think, a workable ability to determine when a substantial and representative complement has been achieved.

QUESTION: Mr. Cohen, why shouldn't we give some weight to the dictum in Burns where we did stress the fact that there had been an election within the prior year? I mean, what we have here is one hypothesis heaped upon another until the result you get is quite unrealistic.

That is to say, we are assuming that it's the same employment unit, and there are a lot of factors that go into that so we give the Board the benefit of the doubt. We also assume if you hire a majority of the employees of the former company you will happen to hire the same majority who favor the union in that company, that is that --

MR. COHEN: No, if I may, we are not assuming that.

QUESTION: Why not?

MR. COHEN: Because the rule of law here is

that there is a presumption of continuity until there is a contrary showing, and the dissent in Burns was obviously correct, that you couldn't tell from the arithmetic in Burns whether any of the employees had in fact voted in favor of the union.

Nevertheless, it didn't trouble the Court because the Court wasn't making a new affirmative determination by proxy of actual union sentiment. It was applying a continuing presumption --

QUESTION: That is different than an assumption?

MR. COHEN: Yes. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cohen.

Mr. Drogin, you have three minutes remaining.

ORAL ARGUMENT OF IRA DROGIN, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. DROGIN: Thank you, Your Honor.

Mr. Justice Scalia has put his finger on the problem from the employer's interests in this case, and that is that we come to a completely unrealistic approach and result, particularly with regard to the continuing demand situation.

We find a demand initially made which would have been unlawful for the employer to accept because at the time that it was made, the employer did not have in

its employ a substantial and representative complement, whatever that may mean.

The demand continued to be an illegal demand at the time that the union filed unfair labor practice charges. It also continued to be an illegal demand at the time that the National Labor Relations Board issued its complaint in December of 1982.

The only time that the demand became legal, according to the continuing demand theory, was a year and a half afterwards when the Administrative Law Judge decided that in January 1983 the employer had reached a representative complement.

Now, this --

QUESTION: No, it began -- a fair description, they said it became legal when it reached a representative complement. Now, you didn't know that until a year and a half later.

MR. COHEN: That's correct. We didn't know until the Administrative Law Judge a year and a half later, in 1984, told us that we should have recognized the union and bargained with them in January of --

QUESTION: But it became a legal demand when it became a legal demand whether or not you knew it at the time.

MR. COHEN: That's correct, but how are we

supposed to comply with the law under those circumstances, and how --

QUESTION: Is that any different from what an employer who is starting up a new business confronts? Let's assume that you hadn't bought this business from anybody and you were just beginning to build up your worker force, and a union came in when you were just -- the same things happened as here.

Wouldn't you have confronted the same problems? Isn't that problem unavoidable?

MR. COHEN: That it was a continuing demand?

QUESTION: No, no. Never mind the continuing demand. Wouldn't you be at risk when a union asked to be represented to determine whether you yet have a representative working force?

Wouldn't you be at your own risk?

MR. COHEN: No, because under Linden Lumber, under those circumstances if the employer refuses to recognize the union -- excuse me, if the employer refuses to recognize the union, the employer has no obligation to go to the National Labor Relations Board to file a representation petition.

The next step is up to the union. If it thinks it has the 30 percent showing of interest that's necessary to get its foot in the door, then it's the

union's obligation to go -- and there is no finding of violation, there's no finding of violation of the law on the part of the employer, and we are not talking about a successor situation now, Your Honor.

We are talking about an ordinary situation where the union comes in and makes a demand, and here to compound the situation the demand was based not on the claim that they were a successor under the law but they were a successor under the terms of an expired contract that Fall River had nothing to do with.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Drogin. The case is submitted.

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-1208 - FALL RIVER DYEING & FINISHING CORP., Petitioner

v. NATIONAL LABOR RELATIONS BOARD

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BY Paul A. Richardson

(REPORTER)