

UPF Corporation and Glass, Molders, Pottery, Plastics and Allied Workers International Union, AFL-CIO, CLC and the International Union of Petroleum and Industrial Workers, AFL-CIO, Party in Interest. Case 31-CA-18132

December 11, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On May 13, 1992, Administrative Law Judge Frederick C. Herzog issued the attached decision. The General Counsel filed exceptions.

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

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order² as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, UPF Corporation, Bakersfield, California, its officers, agents, successors, and assigns, shall take the action sets forth in the Order as modified.

1. Substitute the following for paragraphs 1(a), (b), and (c) and reletter paragraph 1(d) as 1(c).

“(a) Assisting or contributing support to the International Union of Petroleum and Industrial Workers, AFL-CIO (IUPIW), or any other labor organization, or by recognizing IUPIW as the exclusive representative of any of its employees for the purpose of collective bargaining, unless and until IUPIW has been duly certified by the Board as the exclusive representative of the employees in the appropriate unit.

“(b) Giving effect to, or in any manner enforcing, the collective-bargaining agreement with the IUPIW executed by Respondent on or about October 31, 1989, unless and until that labor organization has been certified by the Board as the exclusive bargaining representative of its employees; provided, however, that nothing shall require Respondent to vary or abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which has been established in the performance of the agreement with the

IUPIW or prejudice the assertion by employees of any rights they may have under the agreement.”

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

“(a) Withdraw and withhold all recognition from the IUPIW as the exclusive collective-bargaining representative of any of its employees for the purpose of collective bargaining, and cease to maintain or give any effect to the collective-bargaining agreement with the IUPIW, unless and until that labor organization has been certified by the Board as the exclusive bargaining representative of the employees; provided, however, that nothing shall require Respondent to vary or to abandon any wage, hour, seniority, or other substantive feature of its relations with its employees which has been established in the performance of any agreement with the IUPIW or prejudice the assertion by employees of any rights they may have thereunder.”

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

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT assist or contribute support to the International Union of Petroleum and Industrial Workers, AFL-CIO (IUPIW), or any other labor organization.

WE WILL NOT recognize the IUPIW as the exclusive representative of our employees for the purpose of collective bargaining, unless and until it has been duly certified by the Board as the exclusive representative of the employees in the appropriate unit.

WE WILL NOT give effect to or enforce the collective-bargaining agreement with the International Union of Petroleum and Industrial Workers, AFL-CIO, unless and until that labor organization has been certified by the Board as the exclusive bargaining representative of the employees; but nothing herein shall be construed to require that we vary or abandon any existing term or condition of employment.

¹We adopt the judge's findings that the Respondent violated Sec. 8(a)(1), (2), and (3) of the Act to which there were no exceptions.

²The General Counsel excepted to the failure of the judge's recommended Order and notice to fully describe and remedy the unfair labor practices set forth in the Conclusions of Law. We find merit in the General Counsel's exceptions and shall modify the Order and notice accordingly.

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

WE WILL withdraw and withhold all recognition from the IUPIW as the exclusive collective-bargaining representative of any of our employees unless and until it has been certified by the Board as the exclusive bargaining representative of our employees.

UPF CORPORATION

Ann Reid Cronin, Esq., for the General Counsel.
Sidney P. Chapin and Edwin T. Shea, Esqs. (Werdel & Chapin), of Bakersfield, California, for the Respondent.
Carl S. Yaller, Esq., of Media, Pennsylvania, for the Charging Party.
Dolly M. Gee, Esq. (Schwartz, Steinsapir, Dohrmann & Sommers), of Los Angeles, California, for the Party in Interest.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. This case was heard by me in Bakersfield, California, on July 31 and August 1 and 2, 1990, based on a charge filed by Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL-CIO, CLC (the Glass Workers Union or the Charging Party) on March 2, 1990. The charge alleged that UPF Corporation (Respondent or UPF) violated Section 8(a)(1) and (2) of the National Labor Relations Act (the Act). On May 22, 1990, the Glass Workers Union filed an amended charge which, in addition to restating its prior allegations, further claimed that Respondent violated Section 8(a)(3) of the Act.

On May 30, 1990, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(1)¹, (2),² and (3)³ of the Act. The substance of the complaint asserts that Respondent unlawfully recognized the

¹ Sec. 8(a)(1) of the Act provides that, "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; . . ."

Sec. 7 of the Act provides that, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

² Sec. 8(a)(2) of the Act provides that, "It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

³ Sec. 8(a)(3) of the Act provides that, "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any other term or condition of employment to encourage or discourage membership in any labor organization: . . ."

International Union of Petroleum and Industrial Workers, AFL-CIO (IUPIW or Petroleum Workers Union) as the exclusive collective-bargaining representative for certain of its workers,⁴ even though IUPIW did not then represent an uncoerced majority of the relevant employees and was not a lawfully recognized exclusive bargaining representative for those workers. Respondent thereafter filed a timely answer to the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing and were given full opportunity to participate, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and file briefs. Based upon the record, my consideration of the briefs filed by counsels for the various parties and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is a California corporation with an office and a place of business in Bakersfield, California, where, at all times material, it has been engaged in the business of manufacturing glass fiber. During the 12-month period ending with the issuance of the complaint, and in the course and conduct of its business, Respondent purchased and received goods or services valued in excess of \$50,000 at the above location directly from suppliers located outside the State of California.

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

II. THE LABOR ORGANIZATIONS

The complaint alleges, the answer admits, and I find that the Charging Party is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

Further, the complaint alleges, the answer admits, and I find that the IUPIW is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

1. Whether Respondent's production and maintenance employees may properly be accreted to a unit of similar employees located at a neighboring facility operated by the Consolidated Fiberglass Products Company (Conglass).

2. Whether the Board lacks jurisdiction in this matter because the IUPIW was not timely served with the charge.

⁴ The complaint alleges, and the answer admits, that on or about October 31, 1989, Respondent and IUPIW executed a document entitled "Articles of Agreement" whereby Respondent recognized IUPIW as the exclusive collective-bargaining representative for all maintenance technicians, maintenance mechanics, furnace/batch/binder operators, lead operators, operators and crew persons employed at Respondent's Bakersfield, California facility.

3. Whether Respondent violated Section 8(a)(1) and (2) of the Act by recognizing IUPIW as the exclusive collective-bargaining representative for its production and maintenance employees at a time when said labor organization did not possess majority status.

4. Whether Respondent violated Section 8(a)(1) and (3) of the Act by entering into a union-security agreement with IUPIW while that labor organization did not possess a majority status.

5. What are the appropriate remedies, if violations of the Act are indeed found in this case.

B. Background

In September 1988, Respondent began construction of a plant for the production of wet chopped fiberglass and roofing materials at 3447 Standard Street in Bakersfield, California. Respondent's plant was completed and began production in mid-October 1989.⁵ The parties stipulate that as of October 31, Respondent employed 28 employees at its Bakersfield plant.

Respondent's new plant is located about 300 to 400 feet from three facilities owned and operated by Conglass. These facilities consist of a roofing plant, a mat plant, and a maintenance service plant. In November, Conglass employed between 40 and 50 maintenance and production workers who were current on union dues at the three Conglass facilities. At all times relevant, the IUPIW was the recognized exclusive collective-bargaining representative for the workers at Conglass.⁶ Since the 1950s, it has been affiliated with the Seafarer's International Union of North America, AFL-CIO (the Seafarers Union).

C. The IUPIW-UPF Collective-Bargaining Agreement and Subsequent Events

During April or May, George Beltz, president of IUPIW, and Earl Church, an International representative for the IUPIW,⁷ met with John Rutledge, Ron Peterson, and Gary Fuller. Rutledge was then the human resources manager for both Conglass and the Respondent corporation. Peterson was Respondent's general manager and vice president, and Gary Fuller was Respondent's plant manager. The meeting took place at Conglass' office. At the meeting, the IUPIW sought to add UPF's production and maintenance employees to its existing Conglass agreement. While not objecting to recognizing the IUPIW as the exclusive collective-bargaining representative for said workers, Respondent refused to add

⁵ Unless otherwise stated, all dates hereafter refer to the year 1989.

⁶ Art. 1, sec. 1 of the articles of agreement between Conglass and the IUPIW (the Conglass agreement), effective during the period between June 1, 1988, and June 1, 1990, recognized IUPIW as the exclusive collective-bargaining representative for the following Conglass employees:

All production and maintenance employees employed by [Respondent] at its [sic] facilities at 3801 Standard Street and 3531 Shell Ave., Bakersfield, California, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

⁷ George Beltz testified that IUPIW's International representative functioned as its business representative.

those employees to the existing Conglass agreement.⁸ Instead of sought to enter into a separate bargaining agreement with the IUPIW in regards to its maintenance and production employees.⁹

After the April or May meeting, Respondent and the IUPIW entered into negotiations for an agreement governing the compensation, rights, privileges, and working conditions for Respondent's maintenance and production employees.¹⁰ Negotiations were completed in August.

Thereafter, on October 31, Respondent signed the resultant document entitled "Articles of Agreement between U.P.F. Corporation and The International Union of Petroleum and Industrial Workers" (the UPF agreement). The IUPIW signed the UPF agreement on November 6.¹¹ All parties stipulate that on November 6, and at all times prior to that date, the IUPIW did not have authorization cards, or other writings, signed by a majority of Respondent's production and maintenance employees designating the IUPIW as their agent for purposes of collective bargaining.

There is no evidence in the record which establishes that Respondent's employees were notified of the IUPIW-UPF contract negotiations and/or of the existence of the UPF agreement prior to December 6.

On that date, Earl Church, on behalf of the IUPIW, dispatched letters to Respondent's maintenance and production employees, informing them that it had reached a labor agreement with the UPF Corporation, and that the agreement would be put into effect after IUPIW reviewed its provisions with them for possible changes and acceptance. The letter also arranged three meetings between the IUPIW and the relevant employees to take place at a Best Western Inn on December 13 and 14. Undisputed testimony by various witnesses reveals, and I find, that, at these meetings, representatives from the IUPIW solicited authorization cards from Respondent's employees.¹²

On February 8, 1990, the Glass Workers Union filed a petition with the Board, in which it sought to be certified as the collective-bargaining representative for all of Respond-

⁸ According to Beltz' testimony, the IUPIW also raised the possibility of adding Respondent's workers to the Conglass agreement via a supplementary agreement, or an appendix, during that same meeting; however, this proposal was similarly rejected by Respondent.

⁹ Jack Pfeffer, vice chairman, CEO, and 20-percent stock owner of Respondent (also 5-percent owner of Conglass) testified to another meeting between himself and Thomas Rincon, an International representative organizer from the IUPIW, during which he informed Rincon that the UPF corporation had been formed as a distinct and separate company from Conglass. He also informed Rincon that they were beginning construction of a new plant. Pfeffer did not recall if Earl Church and George Beltz were present at that meeting. However, according to Pfeffer's recollections of the circumstances surrounding the meeting, the meeting apparently took place prior to the April or May meeting.

¹⁰ From the testimony, it appears, and I find, that John Rutledge and Gary Fuller primarily negotiated on behalf of Respondent while Earl Church negotiated on behalf of the IUPIW.

¹¹ George Beltz, Walsh (IUPIW's secretary and treasurer), and Earl Church signed on behalf of the IUPIW. However, this agreement was not signed by any member of Respondent's employee complement.

¹² Diana Thoms and Mike Garcia, employees at UPF during the relevant period, both testified to this effect.

ent's production and maintenance employees employed at its Bakersfield facility.¹³

On February 26, 1990, Michael Sacco, president of the Seafarers Union, on behalf of the IUPIW, filed a charge with the AFL-CIO, in which it was alleged that the Charging Party has violated article XX, sections 2, 3, and 20 of the AFL-CIO constitution by attempting to organize Respondent's employees.

The Board then delayed the processing of the Charging Party's certification petition after receiving a March 1, 1990 letter from Respondent informing it of the article XX charge. According to the testimony of George Beltz, the article XX charge was withdrawn a few days after it was first filed by the Seafarers Union. On March 2, 1990, the Charging Party filed its instant unfair labor practice charge with the Board.

D. IUPIW's Accretion Argument

The IUPIW takes the position that Respondent could not have violated any part of the Act in this case. In particular, it argues that Respondent's recognition of the IUPIW as the bargaining representative for its maintenance and production employees, and its entry into the UPF agreement at a time when the latter possessed no evidence of majority status at its facility, are not unlawful. Instead, the IUPIW contends that Respondent's actions were justified because its new facility should be accreted to an existing unit represented by the IUPIW located at neighboring Conglass. IUPIW's above contention is opposed by the Board, by the Charging Party as well as by Respondent. The latter parties argue that accretion is improper in this case in light of the surrounding facts.

1. Legal principles governing claims of accretion

In cases involving allegations of unlawful, premature recognition of a bargaining representative by an employer, the theory of accretion can serve to insulate the employer from potential liabilities for its alleged unlawful actions.

However, since the application of the doctrine in such cases can so clearly interfere with the rights of interested employees to select a bargaining representative of their own choosing, accretion is necessarily treated as a narrow exception to the general rule against prehire or premature recognition by employers. Hence, under such circumstances, the Board has stated:

Pursuant to this policy, a valid accretion (is found) *only* when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an *overwhelming* community of interest with the preexisting unit to which they are accreted. *Safeway Stores*, 256 NLRB 918 (1981). [Emphasis added.]

From the above statement, it is clear that the doctrine of accretion may be applied only in those cases where it is proven by a heavier evidentiary burden than in unit determination cases. Thus, I must find that accretion is appropriate in this case *only* if the evidence establishes both that:

¹³The Charging Party's petition was given the case number of 31-RC-6667.

(a) The additional employees may be included in a preexisting unit, and, also,

(b) That the additional employees cannot, by themselves, be considered to be a separate appropriate unit.¹⁴

It is also evident that the primary policy in accretion cases is to avoid substantial interference with the additional employees' Section 7 rights through an application of the accretion theory.

The Board has traditionally looked to a number of evidentiary factors in arriving at a determination of the appropriateness of accretion. Thus, factors which are relevant in this case include:

(a) the degree of operational integration between the additional employees' plant and the preexisting unit's plant, including such facts as employee interchange and contact among the employees of the two plants;

(b) similarities in the skills, functions, interests and working conditions of the employees in the two plants; proximity of the plants;

(c) their bargaining history; and,

(d) the degree of common supervision and control.

Super Valu Stores, 283 NLRB 134, 136-137 (1987); *Armcoc, Inc. v. NLRB*, 832 F.2d 357, 362 (6th Cir. 1987), cert. denied 486 U.S. 1042 (1988).¹⁵

I now examine this case in light of the aforementioned factors.

2. The facts

a. Operational integration

Gary Fuller, Respondent's plant manager, testified that Respondent's Bakersfield plant is engaged in the manufacture of "wet chopped fiber glass." According to him, it purchased sand, clay, limestone, and other minor ingredients in bulk. After arriving at Respondent's plant, these ingredients are mixed together in formulated amounts into "batches" which are, in turn, fed into a gas-fired furnace that melts the ingredients into glass. The molten glass is then poured through "bushings" in the form of the finished fiberglass. When the fiberglass cools, it is packaged and sent to customers.

Fuller characterized Respondent's operations as manufacturing processes. However, he distinguished the operations engaged in by Conglass' facilities as fabrication processes.

¹⁴I note that the IUPIW is asserting the accretion theory in this case as an affirmative defense against the alleged violations of the Respondent.

¹⁵In the IUPIW's brief, it cited factors employed by courts to determine "single employer status." However, I find these cases are not controlling in accretion cases. The question of whether employees in two facilities are employed by a single employer is irrelevant to a determination of the propriety of accretion between the employees of the facilities. The focus in accretion cases is on whether the employees of the separate facilities cannot be placed in separate appropriate units and on the degree of their community of interest. Therefore the Board has often found accretion to be inappropriate for employees of distinct facilities even where their employer is ultimately identical. See *Super Valu Stores*, supra; see also *Safeway Stores*, supra.

According to Fuller, Conglass' operations are different from those of the Respondent because Conglass takes various intermediate products, e.g., fiberglass, as well as some raw ingredients, and fabricates finished products, such as mats and roofing materials.

According to Fuller, when Respondent first began production, 100 percent of its chopped fiberglass were purchased by Conglass. At the time of the hearing, however, Respondent was selling some of its fiberglass in Ireland. Nevertheless, over 90 percent of its fiberglass continues to go to Conglass.

But Jack Pfeffer testified as to Respondent's future plans.¹⁶ According to him, Respondent was planning an expansion of its product line to include aircraft insulation and a high efficiency air filter medium. Respondent expected to introduce the new product lines within 4 or 5 weeks after the hearing and also hoped that it will account for over 60 percent of its total business. Fuller testified that the new product lines are to be sold to companies other than Conglass.

Despite the apparent differences in the processes engaged in by the Conglass facilities and by Respondent's plants, testimony during the hearing establishes that some employee interchange between Respondent and Conglass has taken place.¹⁷

Thus, Jose Vela, who worked variously as a packer and an "unwind attendant" at Conglass' roofing plant, testified that he worked at Respondent's plant as a bricklayer for 5 days during February 1990, after being temporarily laid off from Conglass immediately prior to that. Vela also testified that he observed five other Conglass employees working at Respondent's plant during those 5 days.

In addition, Rickey Harris, a maintenance worker at Conglass since September, testified that after March 1990, he and other members of the Conglass maintenance crew began doing work at Respondent's facility. According to Harris, four maintenance workers from Respondent's plant also came to work at Conglass' facilities at that time.¹⁸

However, Jack Pfeffer testified that Respondent is billed for all the services provided by Conglass' maintenance employees. He further stated, without contradiction, that seniority accrued by employees in Respondent's facility is not transferable to Conglass if employees leave to work for Conglass.

Undisputed evidence also establishes that both Respondent and Conglass' employees are paid by Conglass' checks

¹⁶ Pfeffer, in addition to being vice chairman, CEO, and 20-percent owner of Respondent Company, is also vice chairman, CEO, and 5-percent owner of Conglass.

¹⁷ General Counsel argues in brief that only events which occurred on or before the alleged unfair labor practice of October 31 should serve as evidence with respect to the accretion. The General Counsel contends that events subsequent to that date are simply not relevant to the question of whether Respondent committed an unfair labor practice on that date.

I find this argument unconvincing. The propriety of the alleged accretion in this case depends on examining the factual circumstances existing at the different facilities. However, as of October 31, Respondent's facility had only recently begun operations. Hence, the interrelationships between the facilities may not have been fully manifested before that date. I therefore find that events which occurred after October 31 may help elucidate the actual degree of operational integration between the plants.

¹⁸ Harris also testified that the employees at Conglass' and Respondent's plants have separate breakrooms.

issued through Conglass' payroll office.¹⁹ Additional undisputed evidence shows that the two companies at times shared storage space and certain administrative functions.²⁰

However, based on all the evidence in the record pertinent to the factor of operational integration, I am unable to find that this factor clearly weighs in favor of accretion.

While it is apparent that there is some employee interchange as well as some sharing of space between Conglass and the Respondent, it has not been demonstrated that there has been any concerted effort directed at integrating the functions of the two companies. In particular, the instances of employee interchange appear to have been generally unscheduled.²¹

Further, there is some evidence that Conglass' purchase of most of Respondent's products at the time of hearing, and the sharing of many administrative functions between the two companies, may have been only a temporary phenomenon, resulting perhaps from the relative youth of Respondent.²²

At this point, I must note that I have given little weight to evidence pertaining to the similarities in the identities of the owners and corporate officers in the two companies, since operational integration between the two facilities has little to do with issues of common ownership. In fact, accretion has often been denied to units existing in different divisions of a single employer. See *Armco, Inc. v. NLRB*, supra.

b. The skills, functions, and working conditions of the employees from the two companies

The parties agree that all the production and maintenance employees from Conglass and the Respondent Company are unskilled workers. However they disagree on whether the functions and working conditions of these employees differ in any significant manner.

Rickey Harris testified during the hearing that UPF's and Conglass' facilities are similar, in that they all involve continuous production processes, although there exist some variations between the plants. Harris also testified that both the UPF plant and the Conglass plants run 24-hour production facilities. However, according to Harris, UPF operates 7 days a week, in four shifts, while Conglass' mat plant operates 5 days a week, in three shifts. Conglass' roofing plant also operates 5 days a week, but rotates between having two or three shifts per day, depending on demand for its products. Harris further admitted that each of the plants uses different job classifications and titles for their respective employees.

¹⁹ However, Pfeffer testified that within Conglass' payroll system, Respondent's employees are separately identified.

²⁰ Such evidence includes:

(a) Respondent's employees used the same time clock as Conglass' mat plant employees.

(b) Respondent sometimes stored materials at Conglass (in an area referred to as the "bullpen.")

(c) Respondent and Conglass both employ the same accounting company.

²¹ See *Safeway Stores*, supra at 918.

²² Such evidence includes the credited testimony by Pfeffer and Fuller, regarding the planned expansion of Respondent's product lines, as well as Fuller's testimony that he expects Respondent to add administrative personnel as Respondent's business expands due to the new product lines.

Harris' testimony regarding the dissimilarities in the classification of job titles between the plants is supported by documentary evidence from the UPF agreement and from the collective-bargaining agreement for Conglass employees. These documents establish that the employee titles for each of the plants are completely different from those for the other plants. According to Gary Fuller's testimony, the actual duties for some of the employees in each of the plants may overlap despite their different titles. Nevertheless, there is no evidence which indicates complete identity in the duties between employees with different titles in the various plants.

With respect to the working conditions in the various plants, both Fuller and Harris indicated that the machines used in Conglass' mat and roofing plants, as well as the machines used in the UPF plant, are all dissimilar. Furthermore, Fuller, testified without contradiction that the working conditions at the UPF plant are significantly different from the conditions at all the other Conglass plants, because the UPF plant employs furnaces which operate in the high temperature range.²³

In light of the above evidence, I find that consideration of the skills, functions and working conditions for the employees in the two companies does not support IUPIW's contention that Respondent's employees cannot constitute a separate appropriate unit.

Although it has been conceded that all the production and maintenance employees for the two companies are unskilled workers, their job classifications and functions are clearly dissimilar. The admitted overlap in functions between certain employees does not appear to rise to a level which can allow one to equate job classifications at one facility with classifications at the other facility. The most important evidence with respect to this factor, however, is that there are dissimilar machineries present in the UPF and Conglass plants, and the high-temperature working environment in the UPF plant, which is not present in the Conglass plants. Such dissimilarities in working conditions imply possible differences in the interests of the employees in the two plants.

Under these circumstances, the possibility that Respondent's employees may constitute a separate appropriate unit cannot be precluded.

c. Geographic proximity

It is undisputed that Respondent's facility is located within 300 to 400 feet from Conglass' production plants.²⁴ Further, uncontradicted testimony establishes that both Conglass and UPF employees park in the same parking lot.

In light of such evidence, I find that geographic proximity is a factor which weighs in favor of accretion in this case.

d. Bargaining history

Since Respondent's plant began operation only in the fall of 1989, there is no prior bargaining history, aside from the

²³ The UPF furnaces operate in the range of 2700 to 2800 degrees Fahrenheit. According to Harris, while Conglass' roofing plant uses a cooler and boiler and its mat plant operates an incinerator, all of which require heat, they generally operate in the range of about 600 degrees Fahrenheit.

²⁴ Respondent argues that exhibit evidence indicates a fence divides Respondent's premises from that of Conglass. My view is that it not clearly established.

UPF agreement entered into between the IUPIW and Respondent. However, the UPF agreement itself indicates that Respondent's employees constitute a separate, appropriate unit.

Testimony by George Beltz, president of the IUPIW, indicated that during the initial meeting between the IUPIW and the Respondent, it sought to represent UPF employees by including them in the then existing Conglass collective-bargaining contract. Respondent refused, and insisted that its employees should be treated as a separate unit, apart from Conglass employees.

However, Beltz maintained that he continued to believe that Respondent's employees might be accreted to the Conglass unit.

Despite Beltz' belief that accretion is appropriate, the IUPIW proceeded to negotiate a separate agreement with the Respondent on behalf of Respondent's employees. Beltz, however, testified that, at the time, he viewed this agreement only as a supplemental agreement.²⁵ John Pfeffer, vice chairman and CEO of the Respondent, largely confirmed Beltz' testimony.

Beltz' belief that the UPF agreement is "supplementary" to the Conglass contract is weakened by the contents of the documents themselves. Although the substance of the UPF agreement contains many similarities with the Conglass collective-bargaining cocontract, there also exists significant differences between the two.²⁶

The alleged supplementary nature of the UPF agreement, and the implication that Respondent's employees have not been treated as a separate bargaining unit, is further weakened by Beltz' admission that the IUPIW removed a picket at Respondent's gate in July 1990. According to Beltz, in an IUPIW-Conglass labor dispute which occurred at that time, it was decided by the Petroleum Workers Union to also set up a picket in front of Respondent's facility. However, after receiving a letter from Respondent's attorney,²⁷ the picket was removed because he felt that there is as yet no dispute between the IUPIW and the Respondent. Beltz also indicated that the IUPIW removed the picket as a good will gesture to the UPF "division" of Respondent.

In light of the history of bargaining between the IUPIW and Respondent, I find that IUPIW has consistently treated Respondent's employees as a bargaining unit apart from the Conglass employees. Therefore, I find that bargaining history does not support IUPIW's present claim that Respondent's employees cannot constitute a separate appropriate bargaining unit.

²⁵ There is no evidence that Beltz made his view known to the Respondent. In fact, Beltz specifically denied mentioning the accretion issue during a November 8 telephone conversation that he had with Respondent's vice president.

²⁶ Similarities between the contracts include, but are not limited to, provisions affecting holidays, vacations, medical benefits, leaves, bulletin boards, and employee probationary periods. Differences between the contracts include retirement plans, grievance and arbitration procedures, and the agreements' respective union-security provisions, job classifications, and wage scales for the employees of the two companies.

²⁷ Respondent's attorney also represented the interests of Conglass.

e. Day-to-day supervision and control

Joe Ruiz, Conglass' corporate manager for safety and security, testified without contradiction that he hired employees for both Conglass and UPF after January 1990. Before that date, John Rutledge, manager of human resources for both UPF and Conglass, also hired employees for both plants. This testimony is confirmed by Rickey Harris.

The General Counsel, however, points to testimony by Fuller, UPF's plant manager, which explained that, although Rutledge and Ruiz screen employees for both UPF and Conglass, it falls upon Fuller and another UPF manager to interview and finally approve potential UPF employees.

There is also uncontradicted testimony by Rickey Harris that Ron Cheatwood and Paul Murphy, respectively, served as maintenance superintendent and maintenance supervisor at both Conglass and at Respondent's facility. Furthermore, Gary Fuller admits that one of his supervisors had supervised employees from Conglass.²⁸ However, he explained that these employees were not working at Conglass at that time and were considered temporary UPF employees. Fuller further denied that either he, as UPF's plant manager, or Wendell Green, UPF's manager of alloy and production equipment, have ever supervised Conglass employees. I credit Fuller's testimony.

The evidence indicates that there exists some overlap in supervision between Conglass' and Respondent's facilities. However, it does not unequivocally indicate that such supervisory overlap is a widespread phenomenon. Furthermore, it is clear that Respondent has, for the most part, its own management personnel. Therefore, I find that this factor does not greatly enhance the IUPIW's contention that Respondent's employees retains little or no separate group identity.

3. Conclusion

In light of the evidence presented by the parties, I find that the UPF employees possess a group identity and interests separate from the employees at Conglass.

The only factor which unequivocally weighs in favor of accretion in this case is the close geographic proximity between the relevant plants.

However, other factors, such as employees' skills, working conditions, and the bargaining history at UPF, clearly argue against the propriety of accretion in this case.

Factors such as the degree of operational integration, employee interchange and day to day supervision are somewhat ambiguous. But, in light of the restrictive Board policy in granting accretion, I find that these latter factors offer little support for the IUPIW's position in favor of accretion.

General Counsel also argued in its brief that accretion is not warranted here because of the relatively large number of UPF production and maintenance employees in relation to the size of the unit to which the IUPIW seeks to accrete them. I find this argument persuasive, since many of the objective evidentiary factors generally applicable in accretion cases do not offer clear guidance in this case.

From the record, the relevant UPF employees would amount to about 50 percent of the existing Conglass unit. In this situation, accretion is appropriate only where the objec-

²⁸The supervisor is Don Stubblefield, manager of furnace and production operations at UPF.

tive factors clearly weighs in favor of this action so as not to unduly foreclose employees' Section 7 rights. Here, the factors, on the whole, weigh against a finding of accretion.

But even if I were to find that the objective factors give only an ambiguous answer, accretion is not warranted in this case due to the size of the UPF unit in relation to the existing Conglass unit.

For the above reasons, I find that Respondent's maintenance and production employees do not share a sufficient community of interest with Conglass employees such that they may be accreted to the latter's bargaining unit.

E. IUPIW's 10(b) Argument

The IUPIW also argues that the Board lacks jurisdiction on this matter because the original charge was not timely served on it pursuant to Section 10(b) of the Act (29 U.S.C. § 160(b)).²⁹

According to the IUPIW, it is an "independent union" in relation to the instant 8(a)(2) allegation. Hence, it occupies the status of an "indispensable party," and is entitled to receive notice of the charge within the 6-month period prescribed by Section 10(b).

Since all parties agree that the alleged unfair labor practice occurred, if at all, on or about October 31, and since it is uncontradicted that IUPIW was not served with the charge within 6 months of that date, IUPIW now argues that the Board is deprived of jurisdiction over this case. In support of its current jurisdictional arguments, IUPIW relies principally on the case of *Consolidated Edison Co. v. NLRB.*, 305 U.S. 197 (1938).

Both the General Counsel and the Charging Party countered IUPIW's jurisdictional argument by asserting that, while there can be no argument against the proposition that the IUPIW is entitled to receive notice regarding the complaint, and the hearing, in a case such as this, no legal precedents support the IUPIW's position that it is also entitled to receive 10(b) notice of the charge. They further argue that, even if IUPIW was entitled to receive 10(b) notice of the charge, such notice was perfected within the 6-month limitation period, since the running of that period did not begin until December 6.³⁰

I find IUPIW's instant jurisdictional contention to be without merit.

It is undisputed that the IUPIW is an independent union in relation to the present 8(a)(2) allegation.³¹ Further, in view of the Supreme Court's opinion in *Consolidated Edison*, it is clear that IUPIW is an indispensable party to the present proceeding, since the IUPIW's "beneficial interests" in the continued validity of its agreement with the Respond-

²⁹Sec. 10(b) of the Act provides in pertinent part: "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made"

³⁰The Board argues that the Charging Party and Respondent's employees did not, and could not, have known of the October 31, 1989 agreement between Respondent and the IUPIW until after December 6, 1989. The October agreement constitutes the substance of the alleged unfair labor practice under consideration.

³¹In the context of an 8(a)(2) charge, an independent union is one which is not under the control or domination of the employing company. See *Consolidated Edison Co.*

ent may be adversely affected by this proceeding.³² Nevertheless, the legal precedents cited by IUPIW do not support its argument that it is entitled to 10(b) notice of the charge.

The IUPIW places heavy reliance on *Consolidated Edison* to support its instant proposition. That case is factually distinguishable from the current proceeding. In that case, the Supreme Court ruled that independent unions are entitled to notice and hearing before their contracts with employers, alleged to have violated Section 8(a)(2), can be set aside. But this ruling was made in reference to a situation in which the relevant union received neither notice of the complaint, nor notice of the hearing. The Court never addressed the question of whether the independent union was entitled to 10(b) notice of the underlying charge.

Machinists Local 1424 (Bryan Mfg.) v. NLRB, 362 U.S. 411 (1960), another case cited by IUPIW, also does not support its jurisdictional arguments. In *Bryan Mfg. Co.*, Section 10(b) operated to time-bar a Board proceeding which was instituted to invalidate a union-security agreement entered into between the employer and an independent union prior to the time that the union obtained majority status. However, the critical fact which triggered the operation of Section 10(b)'s 6-month statute of limitation in that case was that the underlying charge was not filed with the Board in a timely manner. The Court, in *Bryan Mfg. Co.*, did not address situations involving the untimely service of the underlying charge upon the independent union. *Id.* at 414.

IUPIW failed to cite clear legal support for its argument that it was entitled to receive 10(b) notice of the underlying charge in this case. Thus, while the failure to serve the initial charge upon the IUPIW may not have been in conformity with the dictates of good practice, it also does not appear to be fatal to the present proceeding. In any case, IUPIW's present jurisdictional objection is also meritless on another ground.

From testimony adduced at the hearing, it is apparent that the running of Section 10(b)'s 6-month limitation period did not begin until December 6. Consequently, the service of the amended charge and the complaint upon IUPIW was timely within the meaning of Section 10(b).

During the hearing, three of Respondent's present and former employees testified without contradiction that they learned of Respondent's agreement with IUPIW only after receiving a letter on that subject from Earl Church, International representative of IUPIW, sometime after December 6.³³ In addition, there is no evidence in the record which establish that any of Respondent's employees had so much as an inkling regarding IUPIW's activities prior to that date. Despite such uncontradicted evidence, IUPIW claims that the 10(b) period could not have been tolled until December 6, because there is no evidence of fraudulent concealment by either the Respondent or by the IUPIW. I find this argument unconvincing.

Under Board law, it is well established that Section 10(b)'s limitation period does not begin to run until the ad-

versely affected party receives actual or constructive notice of the alleged unlawful conduct. *J.F. Morris Co.*, 292 NLRB 869, 870 fn. 2 (1989); *Hot Bagels & Donuts*, 227 NLRB 1597, 1597 (1977); *Wisconsin River Valley District Council*, 211 NLRB 222, 227 (1974), *enfd.* 532 F.2d 47 (7th Cir. 1976). This rule has been approved by a number of courts of appeal. See *NLRB v. Electrical Workers IBEW Local 112*, 827 F.2d 530, 533 (9th Cir. 1987), citing *American Distributing Co. v. NLRB*, 715 F.2d 446, 452 (9th Cir. 1983), *cert. denied* 446 U.S. 958 (1984); see also *Armco, Inc. v. NLRB*, *supra* at 362. While the running of the limitation period may also be tolled by acts of fraudulent concealment on the part of the perpetrator of the alleged unfair labor conduct,³⁴ fraud does not appear to be a prerequisite to the rule that the 10(b) period does not begin to run until notice is given to the adversely affected party.

The IUPIW and the Respondent failed to present any evidence which even remotely suggests that Respondent's employees could have learned of their October 31 agreement. Instead, the record on the whole indicates that the employees were kept completely in the dark concerning the IUPIW's newly acquired status as their recognized representative until December 6 at the earliest. In fact, prior to that date, there is no evidence that IUPIW even made known to the affected employees that it possessed the intention to represent them. Clearly, Respondent's maintenance and production employees received neither actual nor constructive notice of the alleged unfair labor conduct.

Therefore, I find that with respect to the alleged 8(a)(2) violation, the 10(b) limitation period did not begin to run until December 6.

Thus, I conclude that the service of both the amended charge and the complaint upon the IUPIW was timely. Accordingly, I further find and conclude that the instant proceeding is not time-barred, and the Board retains jurisdiction.

F. Violations of Section 8(a)(1) and (2)

In its posthearing Brief, Respondent does not argue that it is not liable for violations of Section 8(a)(1) and (2) of the Act.

General Counsel has also correctly pointed out that a violation of Section 8(a)(1) and (2) exists whenever an employer recognized a union which did not possess majority status, regardless of whether the employer's action was undertaken in good faith. *Ladies' Garment Workers v. NLRB*, 366 U.S. 731, 738 (1961); see *E. L. Wagner Co.*, 294 NLRB 493, 498 (1989).

All parties stipulated at the hearing that on or before November 6, Respondent did not have authorization cards or other writings signed by a majority of its production and maintenance employees which show that they were designating the IUPIW as their agent for purposes of collective bargaining. There is also no evidence in the record which indicates that Respondent ever inquired about the IUPIW's majority status prior to November 6 when the UPF agreement was executed. In fact, Gary Fuller, who helped negotiate the UPF agreement on behalf of the Respondent, admitted at the hearing that there was no discussion regarding IUPIW's authorization cards during the negotiations themselves. Accord-

³² In this case, the General Counsel is essentially seeking Respondent's withdrawal from an agreement whereby it recognized IUPIW as the exclusive bargaining representative for certain of its employees.

³³ The three employees are David Barry, Diana Thoms, and Mike Garcia. All three were employed at Respondent's Bakersfield plant throughout the relevant period.

³⁴ See *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378 (9th Cir. 1979).

ing to him, it was only after the UPF agreement was signed that Respondent discussed with the IUPIW the need to obtain authorization cards so as to show that the IUPIW had obtained or retained employee backing.

In light of the above, I find that the allegation that Respondent has unlawfully recognized the IUPIW, a labor organization, before it received authorization as the collective-bargaining agent from an uncoerced majority of maintenance and production employees at Respondent's Bakersfield facility, is fully supported by the facts.

G. Violations of Section 8(a)(1) and (3)

Respondent contends that the General Counsel has failed to establish a violation of Section 8(a)(3) of the Act since there is no evidence which would indicate that Respondent discriminated against its workers with respect to their hire, tenure, or terms or conditions of employment.

However, it is established law that where an employer enters into a collective-bargaining agreement containing a union-security clause with a union which did not possess support from a majority of the employer's workers, that employer has violated Section 8(a)(1) and (3) of the Act. Such an agreement, entered into between an employer and an union that has been assisted by an unfair labor practice, also constitute violations of Section 8(a)(1) and (3) by the employer. *Meyer's Cafe & Konditorei*, a wholly owned subsidiary of *Fred Meyer, Inc.*, 282 NLRB 1, 4 (1986).

In this case, the General Counsel alleges, and Respondent admits, that Respondent entered into a collective-bargaining agreement with the IUPIW which includes a union-security clause. Further, it has been stipulated by all parties at the hearing that the IUPIW, prior to November 6, did not possess any evidence that it had been designated the collective-bargaining agent by an uncoerced majority of UPF production and maintenance workers. Finally, the evidence clearly indicates that the IUPIW's entry into Respondent's facility was assisted by an unfair labor practice committed by the Respondent. Under these facts, I find that the allegation that Respondent violated Section 8(a)(1) and (3) of the Act is well supported by evidence.

IV. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist from its unlawful conduct.

General Counsel, the Respondent, and the IUPIW all agree that the record establishes that Respondent and IUPIW have never enforced the union-security provision. The record also establishes that none of Respondent's maintenance and production employees ever paid union dues to either directly to the IUPIW or indirectly to the Respondent.

Under these circumstances, the remedy of reimbursement is inappropriate. See *Safeway Stores*, 276 NLRB 944 (1985). Therefore, Respondent shall not be required to take any remedial affirmative actions regarding reimbursement of initiation fees or dues.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The IUPIW and the Glass Workers Union are both labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent, on October 31, 1989, by recognizing the IUPIW as the exclusive bargaining representative for its maintenance and production employees through the execution of a collective-bargaining agreement, at a time when the IUPIW did not represent an uncoerced majority of such workers, has violated Section 8(a)(1) and (2) of the Act.

4. The Respondent, on October 31, 1989, by executing a collective-bargaining agreement with the IUPIW containing a union-security provision, at a time when the IUPIW did not represent an uncoerced majority of such workers, has violated Section 8(a)(1) and (3) of the Act.

5. The above unfair labor practices have an effect on commerce as defined by Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁵

ORDER

The Respondent, UPF Corporation, Bakersfield, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Giving assistance and support to IUPIW.

(b) Granting exclusive recognition to IUPIW and executing a collective-bargaining agreement with it which contains a union-security provision when it does not represent a free, unassisted or uncoerced majority in the appropriate unit.

(c) Maintaining or giving any force or effect to the collective-bargaining agreement executed on November 6, 1989, or any modification, extension, renewal, or supplement, purporting to cover Respondent's employees at Bakersfield, California.

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

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

(a) Withdraw and withhold recognition from IUPIW as the collective-bargaining representative of any of its employees at its Bakersfield, California facilities; and cease maintaining, or giving any effect to the collective-bargaining agreement with that union that purports to cover the employees in its Bakersfield facilities.

(b) Post at its facilities in Bakersfield, California, copies of the attached notice marked "Appendix."³⁶ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to

³⁵ All outstanding motions, if any, inconsistent with the terms of this decision are hereby overruled. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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