

**Miles and Sons Trucking Service, Inc. and Construction and Building Material Teamsters, Local 291, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 32-CA-3969**

7 March 1984

**DECISION AND ORDER**

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 3 May 1983 Administrative Law Judge Jay R. Pollack issued the attached decision. The Charging Party filed exceptions and a supporting brief. Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.

We agree with the judge's conclusion that the Respondent was not obligated to bargain with Local 291 in a unit of bottom dump drivers at the Pleasanton facility. There is no evidence that Local 291 ever represented the bottom dump drivers in a unit restricted solely to the Pleasanton facility. On the contrary, there is a history of multi-employer/multiunion bargaining covering, inter alia, the four facilities the Respondent took over from its predecessor employer. Local 291 represented the predecessor's Pleasanton drivers under the multiemployer/multiunion contract in a multi-location unit. Nor did the Respondent's assumption of the predecessor's operations bring about a change such that the single location became an appropriate unit. The Respondent continued to conduct the same bottom dump operations out of the same locations, the same employees operated the same equipment for the same number of hours at all four locations, and the Respondent continued to service the same customers out of the same locations as did the predecessor employer. It is therefore evident that, contrary to the allegations of the

<sup>1</sup> Local 291 has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> Member Dennis agrees that the complaint should be dismissed in its entirety, but relies solely on the General Counsel's failure to establish that Local 291 demanded bargaining, or was the proper bargaining representative at the Pleasanton location, which the General Counsel alleged was the appropriate unit.

complaint, the Pleasanton bottom dump drivers do not constitute an appropriate unit and the Respondent did not violate the Act by refusing to bargain in that unit. Moreover, we agree with the judge's finding that in any event the General Counsel failed to establish that Local 291 requested bargaining in a unit restricted to the Pleasanton location.

**ORDER**

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

**DECISION**

**STATEMENT OF THE CASE**

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on August 16 and October 4, 5, 6, 28, and 29, 1982. Pursuant to a charge filed against Miles and Sons Trucking Service, Inc. (the Respondent) on September 29, 1981, by Construction and Building Material Teamsters, Local 291 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 291), the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing on February 1, 1982, alleging in substance that the Respondent engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, et seq., herein called the Act. Western Conference of Teamsters (the Western Conference) was named in the complaint as a party in interest and served with a copy of the complaint.

On the first day of the instant hearing, August 16, 1982, the General Counsel moved to amend the complaint to allege additional violations of Section 8(a)(1) and (5) of the Act. The General Counsel's motion was granted and a continuance was granted to allow the Respondent sufficient time to respond. Thereafter, on August 19, the Regional Director issued an amended complaint incorporating all of the amendments made orally at the hearing. The Respondent filed a timely answer denying the commission of any alleged unfair labor practices.

**The Issues**

The principal questions presented for decision are:

1. Whether the Respondent is a successor employer to Kaiser Sand and Gravel Company (Kaiser) with respect to bottom dump drivers, previously employed by Kaiser, who were hired by the Respondent at its facility in Pleasanton.

2. Whether the Respondent had a duty to bargain with Local 291 as a successor to Kaiser in a bargaining unit limited to the bottom dump drivers at the Pleasanton facility.

3. Whether the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with Local 291 after July 15, 1981.

4. Whether the Respondent violated Section 8(a)(5) and (1) by bargaining with the Western Conference without the consent of Local 291.

5. Whether the Respondent violated Section 8(a)(5) and (1) by unilaterally changing certain terms and conditions of employees of the bottom dump drivers without prior notice to and bargaining with Local 291.

All parties have been afforded full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record,<sup>1</sup> on the briefs filed on behalf of the parties,<sup>2</sup> and on my observation of the demeanor of the witnesses, I make the following

## FINDINGS OF FACT AND CONCLUSIONS

### I. JURISDICTION

The Respondent is a California corporation with an office and place of business in Pleasanton, California, where it is engaged in the business of long distance contract trucking within the State of California. During the 12 months preceding the issuance of the complaint, the Respondent derived gross revenues in excess of \$50,000 from the transportation of commodities in interstate commerce. The parties agree that the Respondent functions as an essential link in the transportation of commodities in interstate commerce. Accordingly, the Respondent admits and I find that the Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

There is no issue that Local 291 and the Western Conference are now, and both have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent and Kaiser Sand and Gravel Company are subsidiaries of Koppers Company, Inc.<sup>3</sup> Prior to July 13, 1981, Kaiser operated a fleet of bottom dump trucks at facilities in Santa Cruz, Walnut Creek, Mountain View and Pleasanton, California. Kaiser's bottom dump operations was ancillary to its gravel pit operation at the Pleasanton facility.<sup>4</sup> Kaiser also operated ready-mix cement trucks and dump trucks. The drivers employed by Kaiser were covered by a multiemployer-multiunion collective-bargaining agreement between the Aggregate and Concrete Association (ACA) and Bay Area Building Material Teamsters Locals 78, 216, 287, 291,

315, and 853.<sup>5</sup> Kaiser had been a member of the ACA and bound by its multiemployer-multiunion collective-bargaining agreements since at least 1964.

Prior to July 15, 1981, the Respondent's operations consisted essentially of the transportation of bulk cement and concrete to customers located within the State of California. The Respondent operated out of terminals located in Sunnyvale, Santa Cruz/Felton, Santa Rosa, and Lodi, California. The drivers were covered by a single multiunion bargaining agreement known as the Cement Carriers Supplemental Agreement, which agreement was entered into by the Respondent and the Western Conference.<sup>6</sup> The Respondent's bulk cement drivers employed under this agreement were represented by Teamsters Locals 287 (Sunnyvale), 912 (Santa Cruz/Felton), 980 (Santa Rosa), and 439 (Lodi). Local 291 was not party to, and was not involved in, the Cement Carriers Supplemental Agreement.

In November 1980, the Respondent began discussions with Kaiser concerning the possibility of the Respondent's acquiring Kaiser's bottom dump fleet. In February 1981, Herbert Farrer, the Respondent's vice president and general manager, met with Robert Plummer, co-chairman of the multiunion negotiating team entitled the "Cement Carriers Committee,"<sup>7</sup> to discuss the Respond-

<sup>5</sup> The most recent ACA agreement provides in pertinent part:

#### AGREEMENT

This agreement, entered into by and between the undersigned Employer, AGGREGATES AND CONCRETE ASSOCIATION OF NORTHERN CALIFORNIA, INC., for its members and hereinafter called "employers" (listed in Appendix "B") and BAY AREA BUILDING MATERIAL TEAMSTERS Locals 78, 216, 287, 291, 315 and 853 affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, AND WAREHOUSEMEN OF AMERICA, hereinafter called the "Union" covering the employment of persons in the classifications hereinafter set forth by material yards operated by Association members within the territorial jurisdiction of the above Locals affiliated with the International Brotherhood of Teamsters.

Each Local Union shall have exclusive jurisdiction over all work covered by this agreement in its respective counties. Only employees working under the jurisdiction of each Local shall perform work under the terms of this agreement in the geographical area specified.

All regular employees and equipment of the individual employers covered by this agreement in and for these counties shall perform work before any other employees or equipment are utilized.

#### SECTION 1—RECOGNITION

a. The Union is hereby recognized as the representative for bargaining purposes of all persons performing work falling within the classifications hereinafter set forth.

b. The Union hereby recognizes Employer as the collective bargaining representative for its members within the geographical jurisdiction of Local Unions covered by this agreement.

c. The employer agrees not to enter into any agreement or contract with its employees individually or collectively which in any way conflicts with the terms and conditions of this agreement. If the Employer continues to violate this section of the agreement, after receipt of written notice from the Union, the Union may take any legal or economic action against such employer and this section shall not be subject to grievance procedures of this agreement.

<sup>6</sup> The Respondent entered into Cement Carriers Supplemental Agreement with the Western Conference on a single-employer basis and not as part of the California Trucking Association (a multiemployer association which had negotiated the Cement Carriers Supplemental Agreement with the Western Conference).

<sup>7</sup> The "Cement Carriers Committee" was the Western Conference's negotiating entity for purposes of the Cement Carriers Supplemental Agreement.

<sup>1</sup> On January 7, 1983, the General Counsel filed a motion to correct transcript. As the motion is unopposed, the motion is granted and the corrections contained therein are incorporated in the record, sua sponte, as ALJ Exh. 1.

<sup>2</sup> Only the General Counsel and the Respondent filed post-trial briefs.

<sup>3</sup> Local 291 originally charged that the Respondent and Kaiser constituted a single employer. However, the General Counsel issued a complaint on a successorship theory and expressly disavowed any single employer or alter ego theory.

<sup>4</sup> The Pleasanton facility is also referred to as the Radum facility in the record.

ent's intention to take over Kaiser's bottom dump operations. During this meeting, Farrer outlined for Plummer the Respondent's intention to acquire Kaiser's bottom dump operations and its intention to relocate certain of its own bulk cement trucks to the Pleasanton facility. Plummer suggested that Farrer speak with Gene Shepherd, the negotiating cochairman of the Western Conference's Master Freight Division.

Thereafter, in March, Farrer met with Shepherd at the Western Conference's offices in Los Angeles, California. Farrer told Shepherd that the Respondent was considering the purchase of Kaiser's bottom dump fleet and the relocation of certain of the Respondent's bulk cement trucks to Kaiser's Pleasanton facility. Farrer told Shepherd that Kaiser was not receiving a high enough rate of return on its bottom dump operations to satisfy Koppers, the parent company of both the Respondent and Kaiser. Farrer told Shepherd that the Respondent expected to operate the Kaiser bottom dump operations profitably by reducing the management staff and by operating the fleet as a common carrier. Finally, Farrer told Shepherd that the Respondent wanted to operate the bottom dump fleet under its Cement Carriers Supplemental Agreement. Shepherd told Farrer that he would have to talk to the individual local unions and get back with Farrer. Shortly thereafter, Farrer sent Shepherd a letter, dated March 25, setting forth the Respondent's proposed change of operations. Farrer's letter stated, in pertinent part:

Miles & Sons Trucking Service and Kaiser Sand & gravel are subsidiaries of Koppers Company, Incorporated. We are operating two fleets, both have a separate management team. We intend to combine the fleets work with one team, thus lowering our management overhead costs. This planned project will demand the Miles & Sons Trucking Service to be re-located at the Kaiser Sand & Gravel Plant in Pleasanton. A new terminal will be established increasing the union force in this area by eleven teamsters and lowering the Sunnyvale by eleven.

Kaiser Sand & Gravel teamsters are currently party to an A.C.A. agreement. Our plan will include all teamsters to be signatory to the Western States Area Master Agreement, Cement Carriers Supplemental Agreement.

On April 1, Shepherd sent a letter to representatives of Teamsters Locals 287, 912, 980, 439, 291, 576, 315, and 468 calling for a meeting on April 14 of these unions to discuss the proposed change of operations requested by the Respondent.<sup>8</sup> Shortly before the meeting, Shepherd called Farrer and requested that Farrer send a representative to the meeting to answer any questions that the local unions might have. On April 14, Woody Graham, the Respondent's trucking supervisor, and James Elsberry, Kaiser's manager of industrial relations, attended Shepherd's meeting. Local 291 was represented by

<sup>8</sup> Teamsters Locals 287, 912, 980, and 439 were party to the Respondent's Cement Carriers Supplemental Agreement. Teamsters Locals 291 and 315 were party to Kaiser's ACA Agreement. Teamsters Locals 576 and 468 apparently were not party to either agreement but were invited due to a potential effect on their intraunion jurisdiction.

Thomas Nunes, secretary-treasurer, and Robert Crowson, then its president. Also present were Plummer and representatives of six other local unions. Shepherd told the union representatives that the Respondent intended to relocate a member of its then Sunnyvale-based cement haulers to Pleasanton, and that the Respondent intended to acquire Kaiser's bottom dump operations.<sup>9</sup> Nunes immediately stated that Local 291's position was that the Respondent's cement haulers if based out of Pleasanton would be represented by Local 291. Local 468's representatives asserted that Local 468 would represent cement haulers based in Pleasanton. The meeting turned into an argument between Local 291 and Local 468 over who had the right to represent the Respondent's cement haulers if based out of Pleasanton, and finally ended with the two local unions agreeing to submit this "jurisdictional" dispute to Teamsters Joint Council 7 for resolution.<sup>10</sup>

After the April 14 meeting, Farrer and Shepherd were in contact with each other concerning the Respondent's desire to have the bottom dump drivers placed under the Cement Carriers Supplemental Agreement. Shepherd told Farrer to draft some type of agreement covering the bottom dump drivers guaranteeing the maintenance of their then-existing fringe benefits.

On May 6, the Western Conference convened a "Change of Operations Committee" to determine whether the Respondent would be allowed to change its operations as previously proposed by Farrer.<sup>11</sup> Farrer met with various representatives of the various Teamsters locals representing the Respondent's cement haulers. Although Local 291 was given notice of the Change of Operations Committee hearing, no one from Local 291 attended the hearing. The minutes of the hearing indicate that Local 291 was represented by Mario Gullo, representative of Local 287.<sup>12</sup> Farrer presented the Respondent's proposed changes in two parts: "Phase 1" and "Phase 2." As described by Farrer to the committee, "Phase 1" consisted of the Respondent's intent to relocate a number of its Sunnyvale-based cement haulers to Pleasanton, with the balance of the Sunnyvale equipment and drivers to be relocated to another of Kaiser's facilities in Mountain View. "Phase 2" consisted of the Respondent's intent to acquire Kaiser's rock, sand, and

<sup>9</sup> Thomas Nunes testified that there was no discussion, during this meeting, relating to any proposal by the Respondent to acquire Kaiser's bottom dump operations. Crowson could not recall much of what was said at the meeting. Nunes gave the impression of trying to argue his case from the stand rather than attempting to testify to facts. Shepherd, on the other hand, was an impressive and believable witness. Further, Shepherd's testimony was substantially corroborated by Elsberry. Thus, I do not credit Nunes on this point.

<sup>10</sup> Teamsters Joint Council 7 is an organizational entity established under the Teamsters International constitution for the purpose of, inter alia, issuing official sanction and resolving internal jurisdictional disputes among Teamsters local unions.

<sup>11</sup> The change of operations committee is empowered to determine such disputes pursuant to the terms of the Western Master Freight Agreement. The Cement Carriers Supplemental Agreement is a rider to the Western Master Freight Agreement. The Respondent is signatory to both of said agreements.

<sup>12</sup> Nunes testified that Gullo was not authorized to represent Local 291 at the change of operations hearing. Gullo did not testify in the instant proceeding.

gravel (bottom dump) operations and, following such acquisition, the merger of those operations with the Respondent's existing operations, including the consolidation of maintenance and other functions at the Pleasanton facility. At the conclusion of the meeting, the committee granted approval to the Respondent's proposed relocation of its cement haulers from Sunnyvale to Pleasanton and Mountain View. However, the committee deferred approval of the Respondent's "Phase 2," proposed merger and consolidation of the Kaiser bottom dump operations with the Respondent's existing operations. The question of "Phase 2" was left to the Western Conference.

After the committee had deferred approval of "Phase 2," Farrer wrote Plummer, on May 20, requesting that the Respondent's Cement Carriers Supplemental Agreement be amended to include as additional covered commodities, "rock, sand and gravel." On that same date, Farrer forwarded to Shepherd a proposed "Addendum to Cement Carriers Supplemental Agreement," which purported to amend the cement agreement so that it would "coincide with the present rock, sand and gravel (bottom dump) agreements." Shepherd refused to agree to Farrer's "Addendum" and told Farrer that all Shepherd wanted was a "letter of understanding spelling out those conditions not now presently covered by the Cement Agreement." However, Shepherd and Farrer were essentially in agreement that the bottom dump drivers would receive the wages of the Cement Carriers Supplemental Agreement and the higher fringe benefits provided for in the ACA Agreement.

On May 27, the "Cement Carriers Committee" commenced a meeting in Reno, Nevada, at which the committee granted approval to Farrer's May 20 request that rock, sand, and gravel be added as a covered commodity under the Respondent's Cement Carriers Supplemental Agreement. Shortly thereafter Farrer was informed of the committee's decision by either Plummer or Shepherd and the Respondent commenced using its own employees to perform bottom dump work. Prior to May 27, the Respondent owned approximately 14 bottom dump units but these units were not operated by its own employees. Rather, prior to May 27, the Respondent engaged independent owner-operators to transport its bottom dump units, which owner-operators were not covered by the Respondent's collective-bargaining agreement with the Western Conference.

On June 1, the Respondent and Kaiser entered into two separate lease agreements providing for the Respondent's acquisition of Kaiser's bottom dump operations. One lease provided that the Respondent lease from Kaiser "certain real property" located in Pleasanton, which property was to be used by the Respondent for "business office and parking purposes." The second lease provided that the Respondent lease from Kaiser 27 tractors and 75 trailers. Also on June 1, the Respondent relocated its business offices from Sunnyvale to Pleasanton. However, the Respondent did not actually take over Kaiser's bottom dump operations until July 16.

On June 5, Farrer met with Nunes and Crowson at Local 291's offices in San Leandro, California. Farrer explained to Nunes and Crowson the Respondent's inten-

tion to combine its own bulk cement operations with the bottom dump operations it had just acquired from Kaiser. Nunes testified that Farrer discussed the Respondent's intent to relocate a number of its cement haulers to the Pleasanton facility but that there was no discussion of bottom dump operations during this meeting. However, Nunes' testimony was contradicted not only by Farrer but also by Crowson. Accordingly, I reject Nunes' testimony on this point and credit Farrer's account of the meeting.

As mentioned earlier, on April 14, Local 291 and Local 468 agreed to submit their dispute over which would represent the Respondent's cement haulers, when those drivers relocated to Pleasanton, to Teamsters Joint Council 7. On June 17, Teamsters Joint Council 7 issued the following award relating to the question of whether Local 291 or Local 468 would represent the Respondent's Pleasanton-based cement haulers:

[T]he jurisdiction of bulk cement work being performed by Miles and Sons at Kaiser facility in Radium [sic] is the proper jurisdiction of Local 291 with the condition that they (Local 291) accept the existing contract.

Nunes testified that Local 291 "accepted" the award of the Teamsters Joint Council 7. However, Local 291 did not actually assume representation of the cement haulers, apparently because of the condition that Local 291 accept the Cement Carriers Supplemental Agreement.

On July 7, Elsberry sent a letter to the Western Conference, Local 291, and other affected local unions, which letter stated in pertinent part:

Kaiser Sand & Gravel Company will cease operating the bottom dump haulers effective July 15, 1981. These trucks are now owned by Miles & Sons Trucking Service Inc., and may be operated by them under the Cement Supplemental Agreement.

Any agreement to continue the trucking and the employment of your members must be made with Mr. Herb Farrer, Vice-President and General Manager of Miles & Sons Trucking Services, Inc.

On July 8, Farrer sent another letter to Shepherd, with copies to certain affected local unions including Local 291, stating in pertinent part:

It is unfortunate we did not meet today, as we had planned. I want to bring you up to date as to the Miles/Kaiser merger.

The Kaiser Sand & Gravel Transport Fleet will not be operating after July 15, 1981. Commencing on July 16, 1981 all of the Kaiser Sand & Gravel units will be owned and operated by Miles & Sons Trucking Service.

The Miles Management continue [sic] to be in favor of protecting the seniority rights, health & welfare, pension, etc., of the Kaiser Sand & Gravel Teamsters. This was incorporated in our proposal submitted to you May 20, 1981. (See enclosure) However, if we cannot execute this proposal before

July 15, 1981 we hire teamsters as per our existing Western States Master Agreement, Article 3, paragraph C.

I am confused as to which Union will be representing the Alameda County Teamsters. A review of the San Diego hearing reveals Local 468 to have jurisdiction. However, I have been informed Joint Council 7 has awarded jurisdiction to Local 291.

I will appreciate a clarification as we want to call the correct Union when hiring employees.

Is it possible to meet prior to July 15, 1981, to resolve this matter.

Enclosed with Farrer's July 8 letter was the "Addendum to Cement Carriers Supplemental Agreement" which Farrer had previously submitted to Shepherd on May 20 and which had already been rejected by Shepherd on the ground that only a more simplified "letter of understanding" was required.

Also on July 8, Crowson met with Kaiser's bottom dump drivers concerning their proposed employment by the Respondent. Crowson told the drivers that he understood that the Respondent would be offering them employment at the wage rate set forth in the Cement Carriers Supplemental Agreement as opposed to the rate that they were receiving pursuant to the ACA Agreement. Crowson also told the drivers that, if they were dissatisfied with the situation, Local 291 would file charges with the Board to protest the matter. On July 10, Crowson telephoned Farrer and told Farrer that Kaiser's bottom dump drivers were upset at rumors that their seniority would be displaced by the incoming cement haulers employed by the Respondent. Crowson asked Farrer if Farrer would meet with the drivers and dispel these rumors. Farrer agreed to meet with the Kaiser drivers at Pleasanton and inform the drivers that it was not the Respondent's intent to "screw" them out of their seniority and that the drivers would not be displaced by the cement haulers transferring in from Sunnyvale. Pursuant to this conversation with Crowson, Farrer held a meeting, that same afternoon with Kaiser's bottom dump drivers at Pleasanton. Farrer told the drivers that he had been unable to talk to them before because he had not been given approval by Local 291 but that he had now had Local 291's permission to explain the new contract under which the drivers would be working, if they wanted to continue their employment with the Respondent. Farrer said the drivers would receive the terms and conditions of employment set forth in the Cement Carriers Supplemental Agreement, as modified by the "Addendum" which Farrer had sent to Shepherd on July 8. Thus, Farrer told the employees that they would be paid \$11.11 per hour;<sup>13</sup> they would continue to receive health and welfare and pension contributions in accordance with the 1978-1981 ACA Agreement; they would maintain their Kaiser seniority; they would continue to receive overtime pay after 8 hours; and they would maintain their sick leave plan, which was superior to the plan

<sup>13</sup> This wage rate was higher than that received by the drivers under the then existing ACA agreement. However, it was less than what they would have received pursuant to future raises provided for in the 1981-1984 ACA agreement.

in the Cement Carriers Supplemental Agreement. Farrer told the drivers that, if they had any objections to working under these conditions, they would let him know, otherwise the drivers' employment status would be changed from Kaiser employees to the Respondent's employees as of July 15, 1981. None of these drivers expressed objection to the employment conditions set forth by Farrer and all of the drivers were subsequently hired to work for the Respondent at the Pleasanton facility.

On July 16, the Respondent took over the operations of the Kaiser bottom dump trucks at each of the Kaiser facilities located in Santa Cruz/Felton, Walnut Creek, Mountain View, and Pleasanton. With respect to Pleasanton, the Respondent hired all 14 of Kaiser's former bottom dump drivers,<sup>14</sup> without any hiatus in their employment, and assigned the drivers to the same equipment they had been operating during their employment by Kaiser. The drivers continued to perform the same work, during the same work hours, and serviced the same customers as they had prior to July 16. The employees, as of July 17, began receiving the wages and benefits set forth in Cement Carriers Supplemental Agreement, as modified by Farrer's proposed bottom dump "Addendum."

Shortly after July 16, at Shepherd's instruction, Farrer began contacting Teamsters Local Unions 912, 315, and 287—local unions in whose jurisdictions the Respondent began operating bottom dump trucks in order to have them sign the bottom dump "Addendum" Locals 287, 315, 912 signed separate signature pages for the "Addendum" on August 5, 7, and 10, respectively. Farrer signed and dated the signature pages on the above dates as well. By telegram dated August 12, Farrer requested that Local 291 meet with him and sign a "cement Supplemental and Bottom Dump Addendum."

Local 291 made no direct response to Farrer's August 18 telegram. However, on August 31, Crowson wrote Farrer a letter in response to Farrer's July 8 letter to Shepherd. Crowson's letter, stating that it was written on behalf of Locals 291, 287 and 315, stated in pertinent part:

We interpret the proposals which you have submitted as recognition of the existance [sic] of a separate [sic] appropriate bargaining unit for the Rock, Sand and Gravel drivers who are now employed by Miles and Sons in the operation which was formerly performed by Kaiser. We agree that a separate [sic] unit is appropriate, and that the drivers involved are at the present time covered by no Collective Bargaining Agreement.

Accordingly, our three (3) Local Unions are requesting a meeting with you to respond to your proposal and I submit our proposal for a new agreement covering the unit.

<sup>14</sup> The Respondent also hired all the Kaiser bottom dump drivers at the other three locations.

Farrer did not respond to Crowson's letter.<sup>15</sup> Thereafter, Crowson wrote a second letter dated September 18, again requesting negotiations for a unit comprised of all former Kaiser bottom dump drivers. By letter dated September 23, Farrer responded to Crowson's request, stating that the Respondent had entered into a collective-bargaining agreement with the Western Conference of Teamsters which covered the bottom dump drivers in question. Farrer suggested that Local 291 contact Shepherd or Plummer regarding the Respondent's bottom dump drivers and enclosed a Cement Carriers Supplemental Agreement for execution by Local 291. On September 24, Farrer sent a telegram to Local 291 confirming receipt of Crowson's September 18 letter and stating that he was available to meet with Local 291 on October 1. That same morning, Farrer sent a telegram to Shepherd which stated:

Received letter from Local 291 stating they will withdraw employees if I refuse to negotiate. I talked to Bob Plummer, he agreed to attend meeting on Thursday, October 1, 1981. This turn of events requires your attention. Will you call me when you return from Chicago.

Also on September 24, Local 291 confirmed, by telegram, Farrer's proposed meeting on October 1.

However, on September 30, Farrer canceled the scheduled October 1 meeting. On September 29, after discussing Shepherd's objections to the Respondent's proposed "letter of understanding" to replace the "Addendum," Farrer sent a second draft "letter of understanding" to Shepherd. The next day, Farrer wrote Local 291 canceling the October 1 meeting and stating that it was the Respondent's position that the former employees of Kaiser were covered under the 1979 Western States Area Master Agreement and the Cement Carriers Supplemental Agreement which covered cement, sand, and gravel products. Farrer's letter further requested that Local 291 advise the Respondent whether or not Local 291 accepted the Joint Council 7 award of the bulk cement work with its condition that Local 291 accept the existing contract.

By letter dated October 2, Crowson advised Farrer that since the Respondent was refusing to meet with Local 291, Local 291 would henceforth consider the Respondent to be the alter ego of Kaiser and would take the position that the ACA Agreement appropriately covered the Respondent's bottom dump drivers. The original charge in this matter filed on September 29 alleged that the Respondent was the alter ego and/or successor to Kaiser's bottom dump operations.<sup>16</sup>

<sup>15</sup> Sometime in early September, Farrer met with Shepherd in Los Angeles and discussed the fact that Locals 287, 315, and 912 had signed signature pages for the "Addendum" but that Local 291 had signed nothing. Shepherd told Farrer to renew his efforts to obtain a signature from Local 291.

<sup>16</sup> As mentioned earlier, the General Counsel determined not to issue a complaint on the alter ego theory. While the General Counsel did issue a complaint on a successorship theory, he alleged the appropriate bargaining unit as a single location, i.e., the bottom dump drivers at Pleasanton and consistent therewith alleged a demand and refusal to bargain in that same unit.

Following the filing of the charge and the issuance of the complaint, the Respondent relocated several of its bottom dump trucks from its Pleasanton facility to other locations for economic reasons. On the first day of the trial, the General Counsel amended the complaint to include allegations that such relocations of the bottom dump trucks were unilateral changes in violation of Section 8(a)(5) and (1) of the Act.

On December 2, Farrer telephoned Shepherd to obtain information regarding the proper procedure for the Respondent to follow in the event it chose to relocate bottom dump units located in Pleasanton to some other facility. On December 21, by letter, Shepherd notified Farrer that the Respondent could request "a change of operations to close any terminal, redomicile or transfer the work and drivers to another terminal." Shepherd also notified Farrer that "Proper notification must also be sent to the Freight Division of the Western Conference of Teamsters and the affected Local Unions, which I would presume, are Locals 287, 315 and 912." However, Shepherd also advised Farrer that "there is no requirement . . . that Miles and Sons Trucking notify Local 291 of the closure of that terminal and/or redomiciling of those drivers elsewhere."

By letter dated March 29, 1982, Farrer informed Local 291 that the Respondent intended to relocate two of its bottom dump trucks from Pleasanton to Walnut Creek. Farrer's letter ended with the statement, "I anticipate that a decision will be made shortly. If you wish to discuss this matter with me, please do not hesitate to contact me." Farrer's letter did not contain any specific date for the intended relocation, however, Local 291 was sent a copy of the letter from Farrer to Shepherd which gave April 15 as the proposed date. Farrer received no response to the proposed relocation from either Local 291 or the Western Conference. On or about April 15, two trucks and their drivers were transferred to Walnut Creek from Pleasanton.

On April 29, Farrer sent a letter to Local 291 advising Local 291 of the Respondent's intent to relocate two bottom dump trucks from Pleasanton to Mountain View. Copies of this letter were sent to Local 439 and Local 287. Again, Farrer stated that he anticipated a decision on the relocation would be made shortly and invited Local 291 to discuss the matter with him. Within 2 months of Farrer's April 29 letter, the two bottom dump units were relocated to Mountain View.<sup>17</sup> On May 12, Farrer sent another letter to Shepherd, notifying the Western Conference of an intended relocation of two bottom dump units from Pleasanton to Walnut Creek. Farrer sent Local 291 a copy of this letter. Nunes later called Farrer and asked why the Respondent was relocating the trucks. Farrer explained that it was economically necessary for the Respondent to relocate the trucks and Nunes did not object. Nunes asked if these were the only two trucks which were being relocated and Farrer answered that he had relocated a total of six trucks, including the trucks about which he had earlier notified

<sup>17</sup> The two drivers involved in this move were not members of Local 291 but rather were members of Local 287.

Nunes that he intended to transfer. Finally, on June 2, Farrer sent another letter to Shepherd advising the Western Conference of the Respondent's intent to relocate a bottom dump unit from Pleasanton to Felton by June 10. That same date a separate letter was sent to Local 291, however, Local 291's letter did not mention the June 10 deadline. Local 291 did not respond to this letter. Nunes testified, "since I had no response for negotiations, it would be futile for me to protest the movement of equipment." A change of operations hearing was conducted on the movement of the bottom dump unit to Felton and approval was given to the Respondent to relocate the truck. The driver assigned to the truck remained at the Pleasanton facility.

#### A. Contentions of the Parties

The General Counsel alleges that the Respondent is a successor employer to Kaiser under the *Burns* case,<sup>18</sup> a matter which the Respondent does not apparently dispute. However, the General Counsel alleges that the Respondent is obligated to recognize and bargain with Local 291 in a bargaining unit limited to bottom dump drivers employed at the Respondent's Pleasanton facility, thereby excluding from the bargaining unit the Respondent's bottom dump drivers at other locations, and its cement haulers, including cement haulers at Pleasanton. The Respondent contends that the unit alleged in the complaint is inappropriate on the ground that the appropriate unit must be the bargaining unit to which the Respondent became a successor employer, i.e., the multi-union/multilocation unit recognized by Kaiser. In the alternative, the Respondent argues that the appropriate unit would include all of the Respondent's locations and also include the Respondent's bulk cement drivers. Further, the Respondent argues in the alternative that the former Kaiser bottom dump drivers constituted an accretion to the Respondent's existing bargaining unit covered by its collective-bargaining agreement with the Western Conference.

The General Counsel also alleges that the Respondent violated Section 8(a)(5) and (1) by recognizing and bargaining with the Western Conference regarding the unit employees without the consent of Local 291 and by unilaterally transferring certain bottom dump trucks from Pleasanton without prior bargaining with Local 291. As can be readily seen, these allegations are dependent on the General Counsel prevailing on the issue of the appropriate bargaining unit. In addition to the defenses mentioned above, the Respondent contends that the Western Conference was the agent or implied agent of Local 291 and further that Local 291 waived its bargaining rights by failing to timely request bargaining.

#### B. Analysis and Conclusions

In *Burns*, supra, the Supreme Court stated the premise (406 U.S. at 279):<sup>19</sup>

<sup>18</sup> *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

<sup>19</sup> Although the Supreme Court alluded to the "recently certified bargaining agent" involved in *Burns*, it has been repeatedly held that when other factors favoring treating an employer as a successor are present, it is of no significance, as herein, that the union may not have been "recent-

ly" certified, or that it may owe its exclusive status to some lawful process other than Board certification. See *Stewart Granite Enterprises*, 255 NLRB 569, 572 at fn. 16 (1981), and cases cited therein.

The Board has offered the following guidelines for determining whether a successorship bargaining obligation attends the transfer of a business operation:

(1) Whether there has been a substantial continuity of the same business operations; (2) whether the new employer uses the same plant; (3) whether the alleged successor has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether he employs the same supervisors; (6) whether he uses the same machinery, equipment and methods of production; and (7) whether he manufactures the same produce or offers the same services.<sup>20</sup>

The Board has held that the keystone is continuity in the work force, i.e., whether former employees of the predecessor constitute a majority of the new employer's unit employees at a date by which the new employer has hired a "representative complement." See, e.g., *Hudson River Aggregates*, 246 NLRB 192 (1979), enf'd. 639 F.2d 865 (2d Cir. 1981); *Pre-Engineered Building Products*, 228 NLRB 841 fn. 1 (1977).

Applying the above legal principles to the instant case, there is no doubt that the Respondent was a successor employer to Kaiser. The Respondent hired all of Kaiser's bottom dump drivers, leased all of the equipment formerly utilized by Kaiser in performing its bottom dump operations, and continued to service the same customers out of the same locations and facilities previously utilized by Kaiser. In *Burns*, the Supreme Court held that a successor employer is bound by the substantive provisions of the predecessor's collective-bargaining agreement with the incumbent union. As noted earlier, the Respondent does not dispute that it is a successor employer to Kaiser, rather the Respondent disputes the General Counsel's contention that it was obligated to recognize and bargain with Local 291 in a unit limited to the bottom dump drivers at the Pleasanton facility.

The General Counsel argues that the appropriate unit should be determined on the basis of traditional community-of-interest considerations, as if the case arose in the context of a Board representation proceeding. The Respondent, on the other hand, contends the appropriate unit must be the bargaining unit to which the Respondent succeeded, i.e., the unit previously recognized by Kaiser.

The record indicates a history of multiemployer/-multiunion bargaining covering, inter alia, Kaiser's four

ly" certified, or that it may owe its exclusive status to some lawful process other than Board certification. See *Stewart Granite Enterprises*, 255 NLRB 569, 572 at fn. 16 (1981), and cases cited therein.

<sup>20</sup> *Band-Age, Inc.*, 217 NLRB 449, 452 (1975), enf'd. 534 F.2d 1 (1st Cir. 1976), cert. denied 429 U.S. 921 (1976).

facilities employing bottom-dump drivers. However, even if the single location was at one time a separate bargaining unit, it is well settled that a merger of separately certified or recognized units in effect destroys the separate identities of the individual units. It is also well settled that, after such a merger, insistence on separate bargaining in single-plant units where the union or unions were originally recognized is violative of the Act. *Westinghouse Electric Corp.*, 238 NLRB 763, 764 fn. 2 (1978).

A case directly on point is *White-Westinghouse Corp.*, 229 NLRB 667 (1977).<sup>21</sup> In that case numerous local unions were separately certified or recognized at approximately 42 Westinghouse plants. Bargaining, however, was conducted on a multiplant basis and, as each plant was certified or recognized, it was immediately covered by the multiplant agreement.

White purchased Westinghouse's five plant appliance divisions and assumed the obligations of the multiplant agreement. Upon the expiration of the agreement, however, White refused to bargain on a multiplant basis and sought to establish single-plant units. In his decision, which was adopted by the Board, the administrative law judge found (229 NLRB at 672):

It is axiomatic that parties to a collective-bargaining relationship may, by contract, bargaining history, or a course of conduct, merge existing certified units into multiplant appropriate units. *General Electric Co.*, 180 NLRB 1094, 1095 (1970); *Oil, Chemical & Atomic Workers v. NLRB* [486 F.2d 1266] at 1268. The merger of separately certified units, in effect, destroys the separate identity of the individual units.

Relying primarily on the history of multiplant bargaining, the administrative law judge concluded that the individual units had merged into a larger, multiplant unit. White was therefore required to bargain on a multiplant basis even though it had purchased only part of its predecessor's unit.<sup>22</sup>

*White-Westinghouse* is directly applicable to the instant case. In this case, the Respondent purchased part of a unit which had a long history of multiunion/multilocation bargaining. Not only were Kaiser's agreements companywide, but the right to enter conflicting local agreements was expressly prohibited. The General Counsel contends that, unlike the unions in *White-Westinghouse*, each union signatory to the ACA reserved jurisdiction over the work to be performed in its respective county. This distinction is, however, unhelpful because this reservation, when read in conjunction with the prohibition of conflicting agreements, is tantamount to the contract provision in *White-Westinghouse* which permitted the local unions to enter into nonconflicting local "supplements."

Accordingly, the bargaining history reveals that the Pleasanton bottom dump drivers were merged into a multiunion/multilocation bargaining unit. Further, the

<sup>21</sup> Enfd. 604 F.2d 689 (D.C. Cir. 1979).

<sup>22</sup> The fact that in this case the General Counsel, as opposed to the employer, seeks to carve out a smaller appropriate unit is immaterial. The issue is still whether the successor employer stands in the shoes of his predecessor and must bargain in the unit to which he succeeded.

record reveals that Local 291 considered the bargaining unit to be a multiunion/multilocation unit. Accordingly, on August 31 and again on September 18, Local 291 requested that the Respondent recognize and bargain with Local Unions 291, 287, and 315 for a unit comprised of all former Kaiser bottom dump drivers. On October 2, Local 291 took the position that the Respondent was Kaiser's alter ego and, therefore, bound to the multiunion/multilocation ACA Agreement. The record contains no explanation for the complaint allegation that Local 291 demanded and the Respondent refused to bargain in the single-location unit.<sup>23</sup> In any event, the Respondent succeeded to the multiunion/multilocation and was obligated to bargain with the unions on such a basis but was under no obligation to bargain with Local 291 on a single-location basis. Therefore, the Respondent cannot be found to have violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

I decline the General Counsel's initiation to determine, as if presented in the context of a Board representation case leading to an election, whether the bottom dump drivers based at Pleasanton would constitute an appropriate unit. The problem presented is to determine the contours of the unit to which the Respondent succeeded. Although it is possible that a unit can be so fragmented by a sale as to require an entirely new determination of appropriateness, the record herein does not indicate such a fragmentation.<sup>24</sup> The original unit apparently involved bottom dump and bulk cement drivers of many employers operating out of many locations; Respondent acquired the bottom dump operations of one employer and continued to operate it out of the same four locations. The alteration of the unit did not destroy its appropriateness and thus the predecessor's agreed-upon unit, rather than traditional community of interest concepts, is determinative.<sup>25</sup> Similarly, the multiunion nature of the incumbent union cannot be disregarded as the General Counsel would desire. See *Jones Motor Co.*, 260 NLRB 97 (1982).

Having found that the General Counsel failed to prove the appropriate unit, an essential element in a refusal-to-bargain case, I recommend dismissal of the complaint. In so doing, I decline to determine whether the Respondent has violated the Act on some other theory consistent with my unit finding. The parties framed the issues and litigated the case based on the General Counsel's complaint allegations. Thus, the Respondent was given no notice and no meaningful opportunity to fully litigate any additional allegations or theories.<sup>26</sup> Accordingly, I

<sup>23</sup> Accordingly, if the General Counsel prevailed on the appropriate unit, his complaint would have to be dismissed because no demand to bargain by Local 291, and a fortiori no refusal to bargain by the Respondent, has been proven in that unit.

<sup>24</sup> See, e.g., *Atlantic Technical Services Corp.*, 202 NLRB 169 (1973); *NLRB v. Band-Age Inc.*, supra, 534 F.2d at 4, 6.

<sup>25</sup> See also *Zim's Foodliner*, 201 NLRB 449 (1973), enfd. 495 F.2d 1131 (7th Cir. 1974), cert. denied 419 U.S. 838; *Ranch-Way, Inc.*, 183 NLRB 1168 (1970), enfd. 445 F.2d 625 (10th Cir. 1971).

<sup>26</sup> See *Albertson's Inc.*, 243 NLRB 362 (1979); *NLRB v. Blake Construction Co.*, 663 F.2d 272, 279 (D.C. Cir. 1981).

need not, and do not, reach the issues of whether the Respondent violated the Act by dealing with the Western Conference or by relocating certain of its trucks from Pleasanton to other facilities. Such issues were litigated on the assumption that they were dependent on the General Counsel's prevailing as to the appropriate unit.

#### CONCLUSIONS OF LAW

1. The Respondent, Miles and Sons Trucking Service, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Construction and Building Material Teamsters, Local 291, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Western Conference of Teamsters are both labor organizations within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to establish by a preponderance of the evidence that the Respondent, as

alleged in the complaint, as amended, violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with Local 291 in an appropriate unit within the meaning of Section 9(b) of the Act.

4. The General Counsel has not established that the Respondent has violated the Act.

On the basis of these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended<sup>27</sup>

#### ORDER

It is hereby ordered that the complaint be dismissed in its entirety.

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<sup>27</sup> All outstanding motions inconsistent with this recommended Order hereby are denied. 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.