

**Moeller Bros. Body Shop, Inc. and East Bay Automotive Council and its affiliate Unions, Machinists Automotive Trades District Lodge No. 190 of Northern California; East Bay Automotive Machinists Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL-CIO; Auto, Marine and Specialty Painters Union, Local No. 1176, affiliated with Brotherhood of Painters and Allied Trades, AFL-CIO; and Teamsters Automotive Employees Union, Local No. 78, affiliated with International Brotherhood of Teamsters, AFL-CIO.**<sup>1</sup> Case 32-CA-10902

January 28, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On September 28, 1990, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs.

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, and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to pay all of its journeymen employees contractually required fringe benefits and by failing to pay its utility employees contractually required wages and fringe benefits. The Respondent has not excepted to these findings. The judge, however, found that the remedy for these violations is limited by Section 10(b) to the 6 months prior to the January 30, 1990 unfair labor practice charge. The General Counsel and the Charging Party except, contending the remedy should date back to January 1, 1987, as alleged in the complaint.

The judge further found that, although the Respondent unilaterally decided what wages and benefits would be paid to its prejourneymen employees, Section 10(b) bars any finding that that action violated the Act. The General Counsel and the Charging Party except, contending that, as alleged in the complaint, the Respondent has since January 1, 1987, violated Section 8(a)(5) and (1) of the Act by failing to apply the contract to prejourneymen employees.

<sup>1</sup>The name of the Charging Party has been changed to reflect the new official name of the International Union.

<sup>2</sup>We shall modify the remedy to provide that the Respondent make the health and welfare fund whole, in addition to the employees, for the failure to make the appropriate fringe benefit payments.

The sole issue before the Board is the extent to which Section 10(b) limits remedial relief for the Respondent's unilateral actions in disregard of its bargaining agreement with the Union. Contrary to the General Counsel and the Charging Party, we agree with the judge's resolution of this issue in light of the particular facts present in this case.

The Union has been party to successive bargaining agreements covering the unit employees since 1953. The Respondent's owner, Quentin Bammer, purchased the business in 1977 and has since been signatory to successive bargaining agreements with the Union. In the 1983 contract the parties negotiated the deletion of the existing apprenticeship program. The most recent contract, effective from September 1, 1986, through August 31, 1989, like the preceding contract, does not contain an apprenticeship program. That agreement, however, retained the union-security provision from the previous agreements.<sup>3</sup>

Bammer believed that the union-security clause imposed no affirmative obligation on the Respondent to refer newly hired employees to the Union, and the Respondent has accordingly failed to do so since 1977.<sup>4</sup> Bammer also believed that the 1983 deletion of the apprenticeship provisions limited the contract's application to journeymen. Accordingly, since 1983, Bammer has hired prejourneymen employees at individually negotiated pay rates and has not paid fringe benefit fund contributions on their behalf.

The Respondent, since at least January 1987, has hired journeymen and paid them contractually required wages, but has not made fringe benefit fund payments on their behalf. In the same period, the Respondent has hired utility workers and has neither paid them contractually required wages nor made fringe benefit fund payments on their behalf.<sup>5</sup> Since Bammer's purchase of the company in 1977, the Respondent has made fringe benefit fund payments on behalf of up to four journeymen employees.

The Union never appointed a steward at the Respondent's facility, although contractually permitted to do so. The judge found that the union officials rarely visited the Respondent—once in 1983 and once in 1986 during contract negotiations, and once in 1986 or

<sup>3</sup>The union-security clause set forth in the most recent contract provides, in pertinent part: "The Employer agrees that when a new employee is hired, the employee shall immediately report to the Union for the purpose of informing the Union that he has been hired and intends to assume employment. To implement this procedure, the Union agrees to furnish each person so reporting with written evidence of such contact, the evidence to be filed by such employee with the Shop Steward and the Employer involved."

<sup>4</sup>When in one instance a newly hired employee went on his own initiative to the Union, Bammer made no protest, and covered that employee for the required fringe benefit funds.

<sup>5</sup>Utility workers function essentially as janitors and are included in the bargaining unit set forth in the collective-bargaining agreement.

1987 when a union official had his car repaired. The Union also responded once a year to Bammer's annual claim that the contract had expired. There is no evidence that the Union was ever barred from meeting with or from counting employees, or that Bammer ever affirmatively misled the Union about the number of employees.

Union Official Tolentino testified that he had assumed that the Respondent was a small shop, because it never reported more than four employees on its fringe benefit reporting forms. On November 17, 1989, Tolentino went to the Respondent's facility to discuss a contract proposal and noticed more than four employees working. On the request of the Union, the Respondent immediately provided the names of all employees. Following the Union's filing of an unfair labor practice charge, a complaint issued alleging that the Respondent's failure to pay contractually required wages and to make contractually required fringe benefit fund payments violated the Act.

The judge found, and we agree based on the facts of this case, that Section 10(b)<sup>6</sup> of the Act limits the recovery available for the Respondent's failure to make fringe benefit fund payments and to pay contractually required wages. Although Section 10(b) does not bar an allegation "that was not within the knowledge of or which could not have been discovered by the charging part[y] with reasonable diligence,"<sup>7</sup> we agree with the judge that in the present case the Union failed to exercise such diligence. Accordingly, we conclude with the judge that this failure precludes the finding or remedying of any violation occurring prior to the 10(b) 6-month limitation period.

After the deletion of apprenticeship provisions in the parties' 1983 contract, the Respondent concluded that prejourneymen were not covered by the successive collective-bargaining agreements. Indeed, the Respondent believed that the 1983 agreement modified the unit to exclude prejourneymen. The Respondent acted openly in keeping with this construction of the agreement, and did not in any way attempt to deceive the Union in this regard. Thus, as the judge found, the Respondent never denied the Union access to its facility or misled the Union as to its policy. Had the Union made even a minimal effort to monitor the Respondent's facility since 1983, it should have become aware of the Respondent's policy of hiring prejourneymen at individually negotiated pay rates, without making fringe ben-

efit payments on their behalf. Mere observation would have put the Union on notice that the number of unit employees was at least double the number reported on the Respondent's fringe benefit forms. The Union rarely visited the Respondent's operation however, never appointed a shop steward, who might have been able to check the Respondent's compliance with the agreement as the Union understood it, and never took any measures to enforce the union-security provisions of the contract.

Following the deletion of the apprenticeship provisions in the 1983 agreement, the Union should have been alerted to the uncertain status of prejourneymen under the contract. As the judge noted, a provision in the 1983 and 1986 contracts provided for a "trainee" rate at "specialty shops" that may have been applicable to the Respondent. The Union, however, failed to make any attempt to enforce that provision, or to determine how the Respondent was treating pre-journeymen under the parties' collective-bargaining agreement. In view of the Union's failure to exercise reasonable diligence by which it should have become aware, long before the filing of the charge in this case, of the Respondent's policy vis-a-vis prejourneymen, we find that Section 10(b) bars recovery as to any employees who were hired as prejourneymen.<sup>8</sup>

We further agree with the judge that the Union, in the exercise of reasonable diligence, should have become aware of the Respondent's failure to make fringe benefit fund payments on behalf of journeymen and utility employees and of the failure to pay the utility employees contractually required wages. Throughout the period in issue, the Respondent reported at most four journeymen to the Union but had at least twice that number of employees working in its shop. As noted with regard to the prejourneymen, it is evident that the Union could have readily discovered the discrepancy had it visited the Respondent's shop during operating hours. In fact, when Union Official Tolentino did so, he immediately noted more than the reported number of employees working, requested the Respondent to furnish it with the names of all its employees, and filed the charges giving rise to this proceeding. In addition, the Union has failed since 1977—some 12 years prior to the charge in this case—to

<sup>6</sup>Sec. 10(b) 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 . . . ."

<sup>7</sup>*Oregon Steel Mills*, 291 NLRB 185, 192 (1988), enfd. mem. 134 LRRM 2432 (9th Cir. 1989), cert. denied 134 LRRM 2432 (1990). Where the limitations period has been tolled with respect to the cause of action, it may also be tolled as to the remedy. *Allied Products Corp.*, 230 NLRB 858, 859 (1977), enfd. 629 F.2d 1167 (6th Cir. 1980).

<sup>8</sup>As noted, on the deletion of the apprenticeship provisions in the 1983 collective-bargaining agreement, the parties' collective-bargaining agreements did not have any provisions for prejourneymen. Unlike the violations with regard to journeymen and utility men discussed later in this decision, reference to the collective-bargaining agreement does not disclose the terms and conditions of employment under which prejourneymen were to work. Accordingly, a remedy under *Farmingdale Iron Works*, 249 NLRB 98, 99 (1980), enfd. mem. 661 F.2d 910 (2d Cir. 1981), is not appropriate for those individuals. Though the Respondent had an obligation to bargain with the Union before instituting terms and conditions of employment for these prejourneymen, this alleged failure to bargain is, for the reasons stated above, barred by Sec. 10(b).

monitor or enforce in any manner its contractual union-security rights. Had the Union made any effort to enforce the union-security provisions, it would have become aware that the Respondent was hiring employees without providing fringe benefits and without paying contract wages. Accordingly, we agree with the judge that recovery for the journeymen and utility workers is limited to the 6-month period preceding the filing of the charge. *Farmingdale Iron Works*, supra.

We conclude that the Union is chargeable with constructive knowledge by its failure to exercise reasonable diligence by which it would have much earlier learned of the Respondent's contractual noncompliance. While a union is not required to aggressively police its contracts aggressively in order to meet the reasonable diligence standard, it cannot with impunity ignore an employer or a unit, as the Union in this case did, and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of an employer's unilateral changes. This is not a case where information regarding misconduct is only in the hands of the employer,<sup>9</sup> where an employer has concealed its misconduct,<sup>10</sup> or where the size of an employer's operation prevents ready discovery of the misconduct.<sup>11</sup> Rather, this is a case where the Union, if it had exercised reasonable diligence, would clearly have been alerted much earlier to the misconduct. Accordingly, we adopt the judge's decision.

#### AMENDED REMEDY

The judge's recommended remedy provided, inter alia, that the Respondent make whole all journeymen and utility employees for any expenses incurred as a result of its failure to make required health and welfare fund contributions.<sup>12</sup> The Board's practice is to require

<sup>9</sup>See, e.g., *Connors v. Hallmark & Son Co.*, 935 F.2d 336, 342, 343 (D.C. Cir. 1991), involving Sec. 301 claims to recover delinquent trust fund payments. The D.C. Circuit held that the trustees' claims accrued when they became aware, or reasonably should have become aware, of the delinquencies, rather than the date of the delinquencies, because the information necessary to discover the delinquencies was "by its nature, accessible in the first instance only to the mine operators . . ."

<sup>10</sup>See, e.g., *Burgess Construction*, 227 NLRB 765 (1977), enf. 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979). The Board held that the remedy was not limited to the 10(b) period because the employer deliberately concealed its unlawful employment of nonunion carpenters.

<sup>11</sup>See, e.g., *ACF Industries*, 234 NLRB 1063 (1978), enf. denied in relevant part 596 F.2d 1344 (8th Cir. 1979). The Board found no constructive notice of improper subcontracting because the plant was "extremely large," there were "many employees working," and an employee or steward would not "necessarily be alerted" to employer misconduct. In denying enforcement, the Eighth Circuit did not disagree with the Board's legal principle but with its application to the facts.

<sup>12</sup>The judge inadvertently failed to provide that the journeymen and utility employees be made whole for any expenses incurred as a result of the Respondent's failure to make required pension fund payments. *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980),

additionally that the fund be made whole for those contributions that were not made.<sup>13</sup> Accordingly, we modify the judge's remedy to provide that the Respondent transmit to the Union's health and welfare fund the contributions it failed to make on behalf of its journeymen and utility employees beginning 6 months prior to the filing of the charge in this case.<sup>14</sup>

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Moeller Bros. Body Shop, Inc., San Leandro, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(b) and (c).

"(b) Make all pension and health and welfare fund payments on behalf of its journeymen and utility employees due since July 31, 1989, in the manner set forth in the amended remedy section of the Board's Decision and Order.

"(c) Make whole its journeymen and utility employees for any expenses incurred since July 31, 1989, as a result of the Respondent's failure to make required pension and health and welfare contributions, in the manner set forth in the amended remedy section of the Board's Decision and Order."

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

enf. mem. 661 F.2d 940 (9th Cir. 1981). In addition, the judge inadvertently failed to cite *New Horizons for the Retarded*, 283 NLRB 1173 (1987), in support of his recommendation that payments to employees be made with interest. We modify his remedy to correct these errors.

<sup>13</sup>*Stone Boat Yard*, 264 NLRB 981 (1982), enf. 715 F.2d 441 (9th Cir. 1983), cert. denied 466 U.S. 937 (1984).

<sup>14</sup>Any additional amounts due the fund shall be determined on the basis of the provisions of *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

#### 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.

WE WILL NOT unilaterally change the terms and conditions of employment of our journeymen and utility employees as established by the 1986 collective-bargaining agreement between Moeller Bros. Body Shop and the East Bay Automotive Council.

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 make our utility employees whole for any loss of pay resulting from the unlawful unilateral changes we made in their pay scale since July 31, 1989, with interest.

WE WILL make all pension and health and welfare fund payments on behalf of our journeymen and utility employees due since July 31, 1989.

WE WILL make whole any journeymen or utility workers for any costs they may have incurred since July 31, 1989, as a result of our failure to make required pension and health and welfare fund contributions, with interest.

WE WILL cause all journeymen and utility employees to be covered under the fringe benefit plans established by the 1986 collective-bargaining agreement.

#### MOELLER BROS. BODY SHOP, INC.

*Gary M. Connaughton, Esq.*, for the General Counsel.  
*Marcia Hoyt, Esq.*, of San Francisco, California, for the Respondent.  
*Pamela Allen, Esq. (Boltuch & Siegel)*, of Oakland, California, for the Charging Party.

### DECISION

#### STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Oakland, California, on July 18, 1990, on a complaint issued by the Regional Director for Region 32 of the National Labor Relations Board on March 30, 1990. Amended on July 3, 1990, the complaint is based on a charge filed by East Bay Automotive Council<sup>1</sup> (the Union) on January 30, 1990. It alleges that Moeller Bros. Body Shop, Inc. (Respondent) has committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act.

#### Issues

The amended complaint alleges that Respondent breached the 8(a)(5) and (1) obligation to bargain in two separate ways. First, it asserts that since January 1, 1987, it has failed to make payments to the welfare (health) trust and to the pension trust as required by the collective-bargaining contract then in effect. Second, it alleges that Respondent has failed to pay certain employees the wages to which they are entitled under that agreement (or as set by the agreement even

<sup>1</sup> The caption of the case has been amended to reflect the names of the East Bay Automotive Council's affiliated unions as they were listed on the face of the unfair labor practice charge. They are Machinists Automotive Trades District Lodge No. 190 of Northern California; East Bay Automotive Machinists Lodge No. 1546, International Association of Machinists and Aerospace Workers AFL-CIO; Auto, Marine and Specialty Painters Union, Local No. 1176, affiliated with Brotherhood of Painters and Allied Trades, AFL-CIO; and Teamsters Automotive Employees Union, Local No. 78, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

though apparently expired). The amendment to the complaint lists four individuals by name and asserts there are others whose names are not known. The named employees are Jeffrey Finley, Roberto Ceron, Lorne Lasartemay, and Jimmy Ogden.

Respondent, though acknowledging some pay errors, asserts that the alleged trust payment violations are barred by Section 10(b) of the Act as having been in effect for years prior to the filing of the instant unfair labor practice charge. Second, Respondent argues that in 1983 the bargaining unit was consensually changed to exclude nonjourneymen level workers. At the very least, it asserts, the 1983 change created a contract ambiguity which should be resolved by contract law or by collective bargaining, not by unfair labor practice analysis.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. All parties have filed briefs which have been carefully considered. Based on the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a California corporation, operates an auto body repair and painting business at its facility in San Leandro, California, where it annually derives gross revenues in excess of \$500,000 and purchases and receives goods valued in excess of \$5000 from outside the State. Respondent therefore admits and I find it to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATION

Respondent admits the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### III. ALLEGED UNFAIR LABOR PRACTICES

#### Background

Respondent has had a collective-bargaining relationship with the Union since 1953. When the corporation was purchased in 1977 by its current owner, Quentin Bammer, that relationship continued. The most recent collective-bargaining contract was signed on November 7, 1986, and runs from September 1, 1986, to an indeterminate date governed by anniversaries. The contract which preceded it ran from September 1, 1983, until replaced by the 1986 agreement.

Both the 1983 and 1986 contracts also contain job classifications and wage schedules. Insofar as most of this case is concerned, each job classification refers to "journeymen," such as a journeyman mechanic or painter. The wage schedule relating to each type of journeyman sets forth a wage for a given calendar period, and provides for incremental wage increases on specific dates between September 1, 1986, and January 1, 1989, the last pay increase provided by the contract. It is apparent that the anniversary clause serves as the end of the contract once no more pay increases are due, so long as a party gives the appropriate notice of renewal or modification as required by law. That seems to have oc-

curred here as the parties have been negotiating a new contract.

The recognition clause of both contracts states that Respondent recognizes the Union as the exclusive collective-bargaining agent for its employees "who perform work described as the work jurisdiction of the Union irrespective of where the work is being performed." The work jurisdiction clause of each contract then describes the nature of that work in detail. Without attempting to itemize the work, it is sufficient to state that the clause details the type of work normally performed by mechanics, body shop workers and painters to perform those tasks.

The 1983 contract, however, did something somewhat unusual. It deleted the then current apprenticeship pay scale and program. That deletion was carried over to the 1986 contract. It is this deletion which has given rise to the matter now before the Board.

Bammer testified that once that clause was deleted he considered the contract to cover only those individuals classified as journeymen; less experienced employees, he declares, were not covered. Following that principle, he paid them an individually negotiated pay rate. Since Bammer did not consider them to be covered by the contract if they were not journeymen, neither did Respondent pay fringe benefits on their behalf. At the time of the most recent contract's anniversary, September 1, 1989, the journeyman rate was \$18.80 per hour, as established the previous January. Some of Respondent's journeymen were actually paid more than that, but only some of those whom Respondent considered journeymen were given fringe benefit coverage.

The journeymen for whom Respondent paid at least the proper rate and fringe benefits were, with their hire dates shown in parenthesis: John Clavarie (April 1977), Ruben Zuniga (July 1977), Howard Hoffman (March 1984), and Michael Ridgley (December 1989).

The records also show that prior to the filing of the charge Respondent hired four other journeymen and paid them the proper hourly rate but no fringes: Jean Branscum (November 1988), David Bold (May 1989), Craig Lorenzen (November 1989), and Michael Doherty (January 15, 1990). After the charge was filed Respondent hired four other journeymen at the proper rate, but did not pay fringe benefits for them either. They are Shawn Crump (March 1990), Scott Randall (May 1990), Pat Young (May 1990), and Jimmie Brazeale (June 1990).

In addition, Respondent hired, on the dates shown, the following nonjourneymen: Finley (January 1987), a bodyman;<sup>2</sup> Ceron (September 1987), painting prep man;<sup>3</sup> Lasartemay (December 1989), bodyman; and Ogden (January 8, 1990), utility worker. A utility worker is essentially a janitor and is part of the Teamsters group. Ogden's initial pay was \$11 per hour, 75 cents less than the contract rate.<sup>4</sup>

<sup>2</sup>At the time the charge was filed Finley was earning a little less than the journeyman rate. At the time of the hearing, he had exceeded that level. The parties have stipulated, however, that Respondent had not yet begun to pay fringes on his behalf.

<sup>3</sup>Ceron's situation is the same as described in fn. 2, above.

<sup>4</sup>Other utilitymen hired were Damon Robertson (December 1987) and Ernest Rivera (November 1989). Both were paid less than the contract rate. In addition, Respondent hired a part-time utility person, Richard Bandy (May 1990) at \$6 per hour. Bammer testified that

The 1989 anniversary date is significant because it was at that time that the parties began to negotiate a new contract. It may also have a bearing on the enforceability of the union-shop clause after that date, for the General Counsel and the Charging Party argue that Respondent's failure to honor the union-shop clause is evidence of affirmative misconduct warranting the tolling of the statute of limitations. Even so, it was the resumption of negotiations in 1989 which ultimately led to the discovery of the facts supporting the complaint.

On first reading, the union-shop clause appears to be somewhat unusual. Aside from the normal requirement that all new hires join the Union within 31 days, it seems to impose an affirmative duty on Respondent to send new hires to the union office for clearance.<sup>5</sup> Although that language is certainly useful to the Union so that it may begin the membership process and the fringe benefit signups, I do not think it is significantly different from any other union-shop clause or contract which requires the employee to obtain clearance. Under the standard clauses, unless an employer wishes to run the risk of losing a new hire for failing to meet the union-shop conditions, he must also send the employee to the Union for processing. Although the language here may make that a little more explicit, it is in practice no different from the language more commonly seen. Therefore, I do not regard this contract as imposing any additional burden on an employer than he would have had if the language were more conventional. Certainly Bammer testified that it was not his responsibility to send employees to the Union for clearance and he says he has never accepted that responsibility. On the other hand, when an employee, i.e., Ridgley, did go to the Union to sign up, Bammer made no protest, but covered him as required.<sup>6</sup>

The collective-bargaining contract also contains a provision requiring Respondent to recognize a steward appointed by the Union. Here, the Union has not appointed a steward,

Bandy is a high school sophomore or junior. He appears to be summer help and an employee who is not in the bargaining unit.

<sup>5</sup>In pertinent part, the union-security clause says: "The Employer agrees that when a new employee is hired, the employee shall immediately report to the Union for the purpose of informing the Union that he has been hired and intends to assume employment. To implement this procedure, the Union agrees to furnish each person so reporting with written evidence of such contact, the evidence to be filed by such employee with the Shop Steward and the Employer involved."

<sup>6</sup>Union Business Representative Bernie Tolentino testified that the Union has supplied its employers with a supply of blank "Report of Hire" forms which they are supposed to fill out and give to newly hired employees. He recalled giving such a packet to Bammer in 1977. Bammer testified that he had no such forms. Nonetheless, on December 11, 1989, his office manager, Larry Duke, filled one out for Ridgley. Tolentino concedes that Respondent had never before utilized that form, nor had it used the alternate procedure of sending a report of hire on Respondent's letterhead. When asked if it was possible that Ridgley had obtained the form from the Union and taken it to Duke for signing, Tolentino contended that was not possible. He says the Union guards against possible fraud by denying those forms to employees. I am not convinced. It seems entirely likely that a helpful clerk at the Union might well give a person the proper form in blank with instructions to take it back for the employer's signature. Whatever might have happened with Ridgley, at a time when the union-shop clause was not in effect due to contract hiatus, does not alter the fact that for years Respondent has left enforcement of the union-shop clause to the Union.

assertedly because it has, until now, regarded Respondent as a small shop. Respondent, however, does not regard itself as small, either in size or in volume. Its building is about 16,000 square feet and it repairs 100–125 cars and 3 or 4 heavy trucks per month. The Union, in assuming Respondent to be a small shop, notes that Respondent never reported more than four employees on its fringe benefit reporting forms.

Despite the fact that it had no steward at the facility, the Union rarely visited. On one occasion, the Union's business representative, Bernie Tolentino, brought his car in for repair. He says it was in 1986, but concedes it might have been in 1987. He also came to the shop to consult with the employees during negotiations, apparently 1983 and 1986. In addition, once a year he responded to Bammer's annual claim that the contract had expired. The only time he visited employees was when he went to discuss a new contract.

Even so, there is no evidence that he was ever barred from meeting with or counting employees and there is no evidence that Bammer ever misled him about the number of employees or who they were. On November 17, 1989, when Tolentino and an assistant went to Respondent's establishment to discuss a contract proposal, they noticed more than four workers in the shop. They immediately demanded the names of all the employees. Even though Bammer wasn't there at the time, it only took a phone call for the office manager to obtain permission. Respondent immediately gave the Union the names of all the employees then working.

#### IV. ANALYSIS AND CONCLUSIONS

Respondent's principal defense is Section 10(b) of the Act, the 6-month statute of limitations. In relevant part it states: "no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The Supreme Court has held that the statute bars the Board from relying on unfair labor practices occurring outside the 6-month period to prove the unlawful nature of acts committed within the period. *Machinists Local Lodge 1424 v. NLRB*, 362 U.S. 411 (1960). This interpretation has had a significant impact on the ability of the Board to remedy so-called continuing violations where the practice or policy under attack was established more than 6 months prior to the filing of the charge, but continuing into the 6-month period. In some circumstances the Board has held that where the practice has been ongoing for years, the complaint attacking the practice is totally barred. *Park Inn Home for Adults*, 293 NLRB 1082 (1989); *Continental Oil Co.*, 194 NLRB 126 (1971). In other cases the Board has been willing to issue a remedy reaching back only the 6 months set by the statute. *Farmingdale Iron Works*, 249 NLRB 98, 99 (1980), enfd. 661 F.2d 910 (2d Cir. 1981). In still other cases, the Board has utilized the intentional concealment doctrine to permit recovery reaching back to the time the practice was begun. *Don Burgess Construction*, 227 NLRB 765 (1977), enfd. 596 F.2d 378, 383 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979).

It is the last doctrine which the General Counsel wishes to invoke here. He cites one of the cases in that line, *Viola Industries*, 286 NLRB 306, 318 (1987), in support of that argument. There, in somewhat ambiguous circumstances the administrative law judge cited the rule, commonly seen, that "the notice which starts the 10(b) period running must be

'clear and unequivocal'" and that the injured party must have received "actual or constructive notice of the conduct complained of."<sup>7</sup> He argues from that rule that because the Union here did not discover the practice until November 17, 1989, that the Board should reach the practice from its inception, a date chosen by the General Counsel in 1987.

There is a twofold problem with the General Counsel's argument. The first is that it discounts the unchallenged testimony given by Bammer that the practices were begun in 1983. The second is that the language used in *Viola* is an incomplete statement of the law. In *Viola* there were facts which the Board recited, but did not clearly utilize in its analysis, which showed that the respondent had deliberately concealed the facts from the charging party. For that reason *Viola* is not as persuasive on the issue as it might be. It therefore must be regarded as a deliberate concealment case. If it is not so regarded, it seems subject to the same oversight given *Garrett Railroad Car & Equipment*, 275 NLRB 1032 (1985), by the Third Circuit. The court was concerned that the Board "may have applied an incorrect legal standard in failing to consider whether the Union had exercised due diligence in discovering the operative facts giving rise to its" unfair labor practice claim.<sup>8</sup> In the underlying case the Board had utilized the "actual and constructive notice" standard without also discussing the "due diligence" requirement. On remand Judge Itkin discussed the issue in detail, noting that due diligence is an essential element of the tolling rule and "[A] party's mere ignorance of the circumstances 'does not constitute due diligence' . . . ." On the facts, however, he concluded that the union in that case had used due diligence, but the employer had fraudulently concealed the facts from it. Therefore, he reaffirmed the prior decision. The Board agreed. 289 NLRB 158 (1988).

Likewise, the General Counsel here argues that the facts proven demonstrate that there was an effort by Respondent to conceal the true facts from the Union warranting the invocation of the fraudulent concealment doctrine. Specifically, he asserts that Bammer's refusal to comply with that portion of the union-shop clause ostensibly requiring him to send employees to the union office on their hire is proof that Bammer deliberately withheld information which would have led them to the truth much earlier.

The complaint does not contend that Respondent's failure to follow the apparent mandate of that clause is a separate violation of the Act. It only seeks to obtain a remedy for the failure to pay the fringe plans on behalf of all the employees and to require that the proper level of pay be paid them. As noted above, Respondent has signed a report of hire for the Union only once since 1977, and that occurred in December 1989. It would appear that incident is not particularly significant for at least two reasons. First, it seems to have occurred during a hiatus period between collective-bargaining contracts. It has long been settled that union-security clauses are not in force during those periods. *Colonie Fibre Co.*, 69 NLRB 589 (1946), 71 NLRB 354 (1946), enfd. 163 F.2d 65 (2d Cir. 1947); *New York Shipbuilding Corp.*, 89 NLRB 1446 (1950), and numerous subsequent cases. Second, be-

<sup>7</sup>Citing *Drukker Communications*, 258 NLRB 734 (1981), and *Carpenters (Skippy Enterprises)*, 211 NLRB 222 (1974).

<sup>8</sup>The Third Circuit's 1986 opinion is unpublished. Judge Itkin quotes the pertinent language in his remand decision, cited *infra*.

cause Bammer testified he didn't have a stock of those forms, and because Tolentino hadn't given such forms to Respondent since 1977, it is most probable that the form Ridgley used came from the union office. Whether that probability is what actually occurred is not important. What is material is the fact that it is such an isolated incident that it has no value in demonstrating that Respondent ever interpreted the union-shop clause to require it to send new hires to the Union.

In any event, as I noted in the factual recitation, the language itself, although atypical, is not a significant departure from that which tends to track that portion of Section 8(a)(3) of the Act permitting contracts which condition employment on a new hire's joining the union within 30 days. That language puts the burden on the employee, not the employer. But any employer who wants to avoid the consequences of a failure to comply will normally see to it that the employee has the opportunity to join. Here, Bammer didn't even try to interpret the clause or any duty under it. He simply decided in 1977 that it was the Union's duty to enforce the union-shop clause. He felt it was the Union's business, not his. That policy has been in place for 13 years, and I would be hard pressed to conclude that it constitutes active concealment of new hires from the Union.

None of the foregoing discussion has yet dealt with the "due diligence" issue. Sometimes that issue arises as a response to a deliberate concealment contention; sometimes in the context of simply pointing out that the plaintiff had constructive notice of the activity under scrutiny. In either of those situations the defendant always asserts, based on facts it has adduced, that the other side could have, by using "due diligence" discovered what the truth was. If it can show that the plaintiff failed to use due diligence, even in a fraudulent concealment context, it can withstand the complaint. See *Garrett Railroad Car & Equipment*, 289 NLRB 158 (1988), the remand decision and the cases cited by Judge Itkin.

Here, I find that the General Counsel has not proven that Respondent engaged in any activity which concealed its policies or practices from the Union. It simply interpreted the contract the way it did from at least 1983 on. During that period, as before, it did not send any new hires to the Union for processing. In other words, it stood pat on all these policies. If an employee was a journeyman who chose to fill out the fringe plan papers, Respondent paid for it. If the journeyman did not, Respondent did not. If an employee was hired who did not have journeyman skills, he was paid in a manner not governed by the contract.

The evidence also shows that the Union has tended to ignore Respondent's employees during that period of representation. Thus, it appears that it regarded Respondent as a small shop and did not appoint a shop steward, even though the contract gave it that right. Neither did it make any visits to its employees during that period just to keep in touch. Tolentino only met with Bammer infrequently: once a year when Bammer made an annual effort to argue that the contract had expired, once to get his car repaired, and twice to explain contract proposals to the membership. Neither he nor any union official ever visited the shop to see to the needs of the employees or even to run a routine audit of the general situation at the shop. Had they done any of these things, they would have discovered Respondent's interpretation of the 1983 contract, would have discovered the fringe plan pol-

icy, the pay plan for pre journeymen and the pay discrepancies for the utility employees.

Instead, the Union simply ignored Respondent and its employees. As noted above, ignoring the circumstances does not constitute the exercise of due diligence. I find, therefore, that Section 10(b) does serve as a bar to reaching some of Respondent's alleged unfair labor practices. Certainly its 1983 interpretation of the bargaining unit is barred. It came to believe that the dropping of the apprenticeship program, rightly or wrongly, modified the bargaining unit to mean that the contract covered only journeymen. I note that the contract does contain another clause providing that a trainee rate could be arranged. It seems to apply to so-called specialty shops, and I am not certain whether the Union and Respondent would agree that Respondent is such a shop. Yet, the concept of a trainee rate is clearly not foreign to the Union. Indeed, it seems to me that the Union knows it is common for auto body shops to hire youths as trainees. For that reason it seems likely that the contractual availability of a trainee rate for negotiation was purposeful. It should have been alert to the probability of Respondent hiring trainees.

I specifically find, therefore, that Section 10(b) bars the Board from issuing a remedy with respect to those persons hired who were not journeymen and that the bar extends to Respondent's current practice with respect to the prejourneyman situations of employees Finley, Ceron, and Lasartemay. *Park Inn Home for Adults*, 293 NLRB 1083 (1989); *Continental Oil Co.*, 194 NLRB 126 (1971).

However, if anyone was hired as a journeyman, or became a journeyman after serving a prejourneyman training period, that individual is entitled to full contract fringe benefits for a period extending 6 months backwards from the date the charge was filed. This remedy would extend to journeymen hired after the charge was filed as well. *Farmingdale Iron Works*, 249 NLRB 98, 99 (1980), *enfd.* 661 F.2d 910 (2d Cir. 1981). This remedy applies because the terms and conditions of employment as set by Section 8(d) of the Act (adopting those set by the old contract) remain in force until modified by a new contract or until lawfully set after an impasse.

The utility employees are to be treated only a little differently. Here Respondent paid them neither the pay scale or the fringe benefits set by the old contract. They are, therefore entitled to both backpay and fringe benefit coverage for the 6-month period prior to the filing of the charge. Again, the terms were set by the contract and those terms remained in effect during the 6-month period. *Farmingdale Iron Works*, *supra*.

#### THE REMEDY

Having found that Respondent has engaged in certain violations of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action shall include an order requiring Respondent to make whole those employees who have suffered loss of pay for the 6-month period preceding the filing of the unfair labor practice charge, together with interest thereon. *Ogle Protection Service*, 183 NLRB 682 (1970). It shall also include an order requiring Respondent to make the appropriate contributions to the pension plan, together with interest. *Merryweather Optical Co.*, 240 NLRB

1213, 1216 fn. 7 (1979). In addition, Respondent shall either provide contract health coverage for all journeymen and utilitymen for the 6-month period prior to the filing of the charge to the extent that it has not already done so or it shall reimburse any employee for moneys he or she has paid for health services which would have been covered by the established plan during the 6-month period prior to the filing of the charge. *Triangle Sheet Metal*, 267 NLRB 650 (1983); *Service Roofing Co.*, 200 NLRB 1015 (1972). It shall also immediately arrange for its journeymen and utility employees to become covered by the health trust in the future.

#### CONCLUSIONS OF LAW

1. The Respondent, Moeller Bros. Body Shop, Inc., is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. Within the 6-month period prior to the filing of the charge in the instant case, Respondent unilaterally, and without bargaining with the Union, departed from the terms and conditions of employment established by Section 8(d) of the Act by failing to provide all of its journeymen employees with the fringe benefits to which those conditions entitled them, namely, the health and pension benefits established by the collective-bargaining contract which became effective in 1986. It further departed from those terms and conditions when, during the same 6-month period it failed to pay its utility employees the proper pay scale as set by that same contract and failed to provide the utility employees with the aforesaid health and pension coverage. Such changes constitute a violation of Section 8(a)(5) and (1) of the Act.

4. Except as found in paragraph 3 above, Respondent did not violate the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>9</sup>

#### ORDER

The Respondent, Moeller Bros. Body Shop, Inc., San Leandro, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its journeymen and utility employees as established by the 1986 collective-bargaining contract and as adopted under Section 8(d) of the Act.

<sup>9</sup>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.

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

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

(a) Make whole its utility employees for any loss of pay they may have suffered as a result of the unlawful unilateral changes made in their pay scale since July 31, 1989, together with interest as set forth in the remedy section of the decision.

(b) Make all pension fund payments on behalf of its journeymen and utility employees due since July 31, 1989, together with any interest or penalties as set forth by plan rules.

(c) Make whole any journeyman or utility employee for any health care costs incurred since July 31, 1989, which would have been paid by the welfare plan established by the 1986 collective-bargaining contract, together with interest.

(d) Cause all journeymen and utility employees to be covered under the fringe benefit plans established by the 1986 contract, except to the extent that there might be duplicate coverage under paragraph 2,c, above.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay or other payments due under the terms of this Order.

(f) Post at its auto body and paint shop in San Leandro, California, copies of the attached notice marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to 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.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

<sup>10</sup>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."