

**Torch Operating Company and International Union
of Petroleum and Industrial Workers. Case 31-
CA-20895**

January 28, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On March 8, 1996, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief, the Union filed an answering brief, and the Respondent filed a reply 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,¹ and conclusions and to adopt the recommended Order as modified.²

We adopt the judge's finding that the Respondent is a successor to Unocal, but, unlike the judge, we find it unnecessary to rely on *CitiSteel USA*, 312 NLRB 815 (1993), enf. denied 53 F.3d 350 (D.C. Cir. 1995). In that case, the respondent spent 9 months refurbishing and modernizing a dormant steel mill it had acquired, transforming it from a low-volume "specialty mill" to a high-volume "minimill," before it began limited production. Two additional months passed before it employed a substantial and representative complement of employees, which was the point for determining whether the respondent had a duty to bargain with the union that had represented its predecessor's employees. By that time, the respondent had fully implemented its operational changes to convert the mill into a high-volume "minimill," including changes in the employees' jobs.

In the present case, the Unocal facilities—an offshore oil platform, an oil field, and a processing plant, all of which run on a continuous basis—were in full operation when the Respondent acquired them. In marked contrast to *CitiSteel*, supra, where there was a 2-year hiatus in production, operations here continued uninterrupted on and after November 1, 1994, the date that the Respondent assumed ownership. The following day, the Respondent, which had hired a full workforce composed almost entirely of former Unocal employees, received the Union's letter demanding recognition and

bargaining. Thus, the point for determining whether the Respondent had a duty to bargain with the Union arose almost immediately after the Respondent acquired the facilities, see *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 46-47 (1987), which was before it implemented the changes in operations on which it relies in contending that it lacked substantial continuity with its predecessor.

Thus, the Respondent did not install the first electrical submersible pump at the offshore platform until December 1994 or January 1995 and did not finish installing such pumps until June 1995. Nor was it until July 1995 that the Respondent added two large compressors at the processing facility to allow it to cease piping gas to Unocal's Battles gas plant. No specific dates were given for other changes, such as the Respondent's efforts to "debottleneck" production by identifying and replacing inadequate pipes, pumps, and compressors, but such changes clearly could not have been implemented immediately on the Respondent's acquisition of the facilities.

Accordingly, unlike in *CitiSteel*, supra, the changes on which the Respondent relies in contending that it did not have a duty to bargain with the Union did not occur until well after the point in time for making that determination. Consequently, as the continuous operation of the facilities proceeded unabated and basically unchanged as ownership passed from Unocal to the Respondent, "those employees who [were] retained [would] understandably [have] view[ed] their job situations as essentially unaltered." *Fall River Dyeing*, supra, 482 U.S. at 43.³

In any event, even if the changes that the Respondent eventually did make could properly be considered, they did not change the employees' job situations so greatly that substantial continuity with the predecessor's operations was lost. Thus, while employees on the off-shore platform had to learn to operate electrical submersible pumps, the skills they used when working for the Respondent were basically the same skills they had used when working for Unocal. The same was true of the "de-bottlenecking" project, which, moreover, was merely a temporary project rather than a permanent work assignment. Also, the addition of two large compressors at the processing plant in July 1995 did not substantially alter employees' jobs, as the plant contained other smaller compressors that the employees maintained and monitored. Moreover, while the Respondent's employees began performing pipeline

¹No exceptions were filed to the judge's findings that certain statements by employees indicated that they were opposed to continued union representation.

²We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

³The Respondent assigned 80 to 90 percent of the 36 employees it hired to the job classifications of operator 1, operator 2, or operator 3, which paralleled Unocal's operator 1, operator 2, and utility job classifications. Of the six employees not classified as operators, three were classified as instrument craftsmen and three as testers, classifications that also had been used by Unocal. Unlike *CitiSteel*, where 135 job classifications were reduced to about 25, no dramatic reduction of job classifications occurred.

maintenance that previously had been done by employees of a different Unocal division, such maintenance assignments did not significantly alter employees' job duties, as pipeline maintenance tasks required only about 40 hours a month and the work was divided among 20 employees. Further, while the Respondent assigned employees the new task of identifying problems and participating in team meetings to propose alternatives to mitigate problems, there is no indication how much time employees devoted to this task, which was in addition to their normal production duties. Accordingly, even if changes the Respondent made to employees' jobs after it took over the already operating facilities and after the Union had demanded recognition were taken into account, we would find that such changes were not so great as to sever the substantial continuity between the Respondent's operation and that of its predecessor. Moreover, the magnitude of the changes was less than in *CitiSteel*.

Further, unlike *CitiSteel*, where the respondent transformed a low-volume, specialty steel mill into a high-volume "minimill," here the product of the operation was unchanged. The Respondent continued to extract crude oil from the offshore platform and from the on-shore oil field and pipe it to the processing plant, where the crude oil was separated into oil, gas, and water, just as Unocal had done when it had operated these facilities. While the Respondent took measures to increase production and efficiency, they did not alter the basic nature of the operation. Accordingly, we agree with the judge's findings that there is substantial continuity in the operation of these facilities under the Respondent and under Unocal and that the Respondent is a successor to Unocal.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Torch Operating Company, Lompoc, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

"(b) Within 14 days after service by the Region, post at its three business facilities located at Platform Irene, Lompoc Oil Field and the Heating, Separating and Pumping facility at or near Lompoc, California, copies of the attached notice marked 'Appendix'¹¹ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 Re-

spondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 17, 1994.

"(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

Ann Cronin-Oizumi, Esq., for the General Counsel.

J. Richard Hammett and Lewis B. Gardner, Esqs. (Brown McCarroll & Oaks Hartline), of Houston, Texas, for the Respondent.

Stuart Libicki, Esq. (Schwartz, Steinsapir, Dohrmann & Sommers), of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Los Angeles, California, on August 28, 29, and 30, 1995,¹ pursuant to a complaint issued by the Regional Director for the National Labor Relations Board (the Board) for Region 31 on April 28, 1995, and which is based on a charge filed by International Union of Petroleum and Industrial Workers (the Union) on November 17. The complaint alleges that Torch Operating Company (Respondent) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Issues

(1) Whether Respondent is a successor to Unocal with respect to three facilities acquired by Respondent from Unocal.

(2) If Respondent is a successor to Unocal, whether Respondent unlawfully failed to recognize and bargain with the Union as the exclusive collective-bargaining representative of unit employees who had formerly been employed by Unocal at the three facilities referred to in (1) above, and who had formerly been represented by the Union while working for Unocal.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, the Charging Party, and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

¹ All dates herein refer to 1994 unless otherwise indicated.

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a corporation which operates a business managing oil and gas assets with places of business located in Santa Maria and Lompoc, California. Respondent further admits that during the past year, in the course and conduct of its business, that its gross revenues exceeded \$500,000 and that during the past year, Respondent in conducting its operations described above, purchased and received at its California locations goods or services valued in excess of \$50,000 directly from points outside the State of California. Accordingly it admits, and I find, that it 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

Respondent admits, and I find, that International Union of Petroleum and Industrial Workers is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*²

Prior to the sale of assets which is in issue in this case, Unocal Oil Company of California (Unocal) employed a unit of production and maintenance employees which unit was certified by the Board in 1945 (G.C. Exh. 6, art. 1,A). The most recent collective-bargaining agreement between the parties for 1993-1996 was admitted into evidence (G.C. Exh. 6). This agreement covered approximately 460 bargaining unit employees in various classifications and assigned to various facilities located primarily in the Central California area. Three of the facilities are in issue in this case, and in these facilities approximately 42 bargaining unit employees were employed. After the sale of assets³ of the three facilities in issue, 36 bargaining unit employees were hired by Respondent, 26 of whom had been working at the time of hire at the three facilities and 9 of whom had been working for Unocal in the bargaining unit, but not within the three facilities in issue.⁴

Thus on November 1, Respondent purchased from Unocal:

- (a) California offshore oil platform Irene located at Point Pedernales, California;
- (b) A Lompoc, California oil field;
- (c) A Lompoc, California Heating, Separating and Pumping (HSP) facility (G.C. Exh. 1(I), par. 2).

²In part, the facts of this case are based on a five-page stipulation of facts (with four pages of exhibits attached) admitted into evidence as (G.C. Exh. 1(i)).

³Technically, the owner of the assets purchased by Respondent was a partnership consisting of five major oil companies of which Unocal was one, perhaps the dominant partner. Because the stipulation agreed to by the parties refers to Unocal exclusively as the former owner of the assets in question and because it otherwise makes no difference to the outcome of the case, I will refer only to Unocal in this decision.

⁴The final employee hired had been working for Unocal not as an employee, but as an independent contractor.

At all times since on or about November 1, Respondent has employed as a majority of its production and maintenance employees employed at the three facilities mentioned above (excluding office and clerical employees, fire & safety inspectors, technicians, professional employees, guards, and supervisors as defined in the Act) individuals who immediately before November 1, were employed by Unocal as production and maintenance employees at the facilities (excluding the same classifications recited above) and were represented by the Union for the purposes of collective bargaining.

The Union demanded recognition and bargaining in a letter dated November 1 and received by Respondent on or about November 2 (G.C. Exh. 3).⁵ In a reply letter dated November 10, and received by the Union on the same date, Respondent asserted that because of a "reasonably grounded, good faith doubt based on objective considerations that the union currently represents a majority of the employees in question," Respondent declined to recognize the Union as the employees' exclusive collective-bargaining representative (G.C. Exh. 4). (See also G.C. Exh. 1(I), pars. 6, 7.)

B. *Analysis and Conclusions*

1. Applicable law regarding successorship

An employer succeeds to the collective-bargaining obligations of a predecessor employer if (1) there is "substantial continuity" between the two employing enterprises; and (2) a majority of the successor's employees in an appropriate unit were also employed by the predecessor. *Capitol Steel & Iron Co.*, 299 NLRB 484, 486 (1990). See also *CitiSteel USA*, 312 NLRB 815 (1993). In *Briggs Plumbingware v. NLRB*, 877 F.2d 1282, 1285-1286 (6th Cir. 1989), the court pointed out that based on *NLRB v. Burns Security Services*, 406 U.S. 272, 280-281 (1972), and on *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), the Board is required to conduct its "substantial continuity" analysis from the perspective of the employees who have been retained to determine "whether these employees . . . will understandably view their job situations as essentially unaltered." The court in *Briggs* goes on to explain that the successor determination is important because of the presumption that follows: that the union with which the predecessor bargained continues to enjoy majority status with the successor's employees. *Id.* at 1286.

In assessing the "substantial continuity" of the enterprise, the Board considers a number of factors: the degree of similarity in the nature of the two businesses, the extent to which the employees of the new company are performing the same jobs they did in their old jobs under the same conditions and supervisors, and the degree of similarity between the products, the production process and customers. *Fall River Dyeing*, *supra*. See also *Georgetown Stainless Mfg. Corp.*, 198 NLRB 234, 236 (1972), *Blitz Maintenance, Inc.*, 297 NLRB 1005, 1008 (1990).

Of all the factors bearing on successorship, perhaps the most important is a comparison of the workforce of the predecessor and the alleged successor; if a majority of the latter's employees had previously been employed by the former there is usually a successorship, where the bargaining unit of

⁵No issue is raised in this case with respect to the adequacy of the Union's demand.

the predecessor remains appropriate. See *Control Services*, 319 NLRB 1195 (1995). In *Trident Seafoods*, 318 NLRB 738 (1995), the Board stated, "a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness [citations omitted]. The party challenging a historical unit bears the burden of showing that the unit is no longer appropriate [and] the evidentiary burden is a heavy one."

2. Factual findings regarding successorship

At page 23 of its brief, Respondent contends that it is not a successor, because its business after the purchase of assets from Unocal, "was entirely different in kind from that of Unocal." Contrary to this contention, I find that there was "substantial continuity" between the Unocal operation and Respondent's.

In its brief, pages 25-28, Respondent attempts to make complicated what is, for purposes of this decision, essentially a simple operation. As its first witness, Respondent called Robert Huguenard, its field superintendent for the operations here in issue. Prior to being hired by Respondent, Huguenard worked for Unocal for 28 years performing most of the same duties in the same places as he now performs. By training and experience, Huguenard is thoroughly familiar with the operations of both companies insofar as they bear on this case. At my request, he prepared two rough sketches or diagrams illustrating, before Respondent took over and after (ALJ Exhs. 1, 2). First, the operation under Unocal. [Omitted from publication.]

Huguenard also provided some testimony to elaborate on the sketch. Oil and water are extracted by the pumping operation on Irene and are transported via pipeline to the HS & P on shore. There an operation is performed by which the water is separated from the oil and the former is injected into a reservoir called the Lompoc field. The oil then joined by additional oil extracted from an onshore source, the Lompoc field, continues north to the Santa Maria Refinery (SMR). At the SMR, the crude oil is upgraded by the removal of sulfur and coke which is sold separately, and removal of gas which is recirculated into the SMR and used for fuel. The new upgraded crude oil travels via pipeline about 200 to 300 miles further north to the Oleum refinery in Martinez, California, located near San Francisco. At this location, the last stop in the processing of the crude oil, it is broken down into lubricants, fuels such as diesel, jet fuel, or gasoline, or feedstock for synthetics.

Returning to Irene to trace the path of gas which is also extracted from the bottom of the ocean, Huguenard explained that the gas travels via separate pipeline to the HS & P facility where it is dehydrated. Then other gas extracted from the Lompoc oil field onshore joins the gas from Irene and this comingled gas travels to the Battles Gas Plant where sulfur is removed, and the resulting gas is separated into propane butane, bu-mix, natural gasoline, and methane gas and then these products are sold.

To contrast the Unocal operation with that of Respondent's, I look at Huguenard's sketch reflecting the current operation. [Omitted from publication.]

It is apparent that Irene is still in the same place performing the same basic operation as under Unocal. Respondent installed different and allegedly more advanced pumps to ex-

tract the gas and oil at lower cost.⁶ However, Respondent employees on Irene continue to perform essentially the same jobs as they did under Unocal. Maintenance requirements on the two pipelines remain the same and the work to meet these requirements is the same.

The treatment and flow of the oil once it arrives on shore is exactly the same as under Unocal. The gas also comes into the HS & P, as before, and up to July 1995 was processed as before under Unocal. In July 1995, the Battles Gas Plant was closed as it would have cost too much to eliminate certain safety hazards. In July 1995, and subsequently, Respondent modified its processing methods to account for the missing Battles plant. So currently, the gas from Irene and from the Lompoc field goes into injection. Again, on Administrative Law Judge's Exhibit 2, the witness indicated certain new equipment used in the gas processing which was not used by Unocal. This new equipment allegedly led to greater efficiency.

Where a new employer "uses substantially the same facilities and work force to produce the same basic products for essentially the same customers in the same geographic area, it will be regarded as a successor." *Valley Nitrogen Products*, 207 NLRB 208 (1973). In this case, the replacing of certain equipment will not defeat successorship. See *P & M Cedar Products*, 284 NLRB 652, 654 (1987); and *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 465-466 (9th Cir. 1985). I find from the employees perspective, Respondent was operating substantially the same business enterprise as Unocal. Other factors also support this conclusion.

I note there was no hiatus in business operations and the locations of all key operations remained the same. In addition, to the above, the basic methods of production and the customers for the product remained essentially unchanged.

I also find that a majority of Respondent's P&M unit was employed by the predecessor. In this connection, it is of no moment that Respondent only purchased the assets of three facilities and hired perhaps 10 percent of the statewide Unocal unit. In *Planned Building Services*, 318 NLRB 1049, 1062 (1995), the administrative law judge cited *Louis Pappas' Restaurant*, 275 NLRB 1519 (1985), for the proposition

. . . the successorship obligation is not defeated by the mere fact that only a portion of a former union-represented operation is subject to the sale or transfer to a new owner, so long as the employees in the conveyed portion constitutes a separate appropriate unit, and they comprise a majority of the unit under the old operation.

See also *NLRB v. Joe B. Foods*, 953 F.2d 287, 293 (7th Cir. 1992).

The complement of supervisors also supports successorship. On Irene, there were two supervisors, Mark Atkins and Jim Isham, who were not hired by Respondent and did not testify at hearing. For purpose of training, they

⁶According to Huguenard, "everything at Irene is better under Respondent, his new employer: . . . enhanced gas lift, greater compressor throughout, the larger shipping pumps to accommodate the increased production, more oil wells . . . [Respondent] drilled additional wells on the platform) . . . added electric submergible pumps, . . . fewer employees, lower operating expense, and double the oil production" (Tr. 218).

both remained on Irene as Unocal employees until mid-November. Both foremen had been offered jobs by Respondent, but elected to stay with Unocal. These two men were replaced by Jeff Holm and Ed Ratto, two former Unocal supervisors who had worked respectively at the Battles Gas Plant and at the Orcutt office, near the area in issue in this case. Neither Holm nor Ratto testified. Besides Huguenard, the highest ranking official retained by Respondent, the other statutory supervisor retained was Phil Hosh, an HS & P supervisor who did not testify. To be sure two other Respondent supervisors, Phil Sorbet, the district manager of the California operation (highest ranking Respondent official in California) and Gary Hogue, Respondent's administrative manager, in charge of all administrative services for the California office, had no connection to Unocal. In the context of this case, I count the retention of Huguenard and Hosh who work directly with the bargaining unit employee as factors in favor of successorship, notwithstanding the remaining supervisory complement.

Finally, Respondent argues (Br. pp. 29-30) that Respondent employees work under entirely different employment conditions from those at Unocal. In *CitiSteel USA*, supra, 312 NLRB at 815, the successor reduced the job classifications from 134 to 25. It combined some jobs and eliminated others. As a result, each employee now performs several job functions which had been covered by separate job classifications at the predecessor. The Board pointed out that employees were required to perform some additional tasks, and each also continues to perform work he had performed for the predecessor. This is exactly the situation in the instant case. Based on *CitiSteel USA*, supra, I find that Respondent's laundry list of alleged difference under Respondent, such as higher starting wage rate, no seniority system, etc. simply does not affect the finding that I make here. Respondent is a successor to Unocal.

3. Respondent's alleged good-faith doubt

Having found above that Respondent is a successor to Unocal, I turn next to consider Respondent's contention that it is not required to recognize and bargain with the Union because it had a good-faith doubt based on objective factors that the Union continued to command majority support. In *AMBAC International*, 299 NLRB 505, 506 (1990), the Board stated applicable law:

The essential principles are well established regarding the presumption of a union's majority support as collective-bargaining representative and the circumstances in which an employer lawfully may withdraw recognition. See, e.g., *Hajoca Corp.*, 291 NLRB 104 (1988), enfd. 872 F.2d 1169 (3d Cir. 1989); *Station KKHI*, 284 NLRB 1339 (1987), enfd. 891 F.2d 230 (9th Cir. 1989). Thus, in the absence of unusual circumstances, there is an irrebuttable presumption that a union has majority status during the year following its certification by the Board. There is a similarly irrebuttable presumption of the Union's majority support during the term of a collective-bargaining agreement. At the expiration of the certification year, or at the expiration of the contract, whichever the case may be, the presumption continues, but it is rebuttable. An employer who wishes to withdraw recognition at the

expiration of the certification year or of the contract may do so in either of two ways: (1) by showing that on the date the employer refused to bargain the union did not in fact enjoy majority status; or (2) by presenting evidence of a sufficient objective basis to support a reasonable doubt of the Union's majority support among the employees at the time the employer withdrew recognition. *Hajoca Corp.*, supra at 105 and cases cited there. These principles are fully applicable to a successor employer, such as the Respondent in this case. See, e.g., *Harley-Davidson Co.*, 273 NLRB 1531 (1985).

See also *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990); and *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1288 (4th Cir. 1995).

The burden of proof for the employer is merely to prove it had objective reasons for doubting the union's majority status. *Safco, Inc.*, 268 NLRB 159, 160 (1983). "Employee statements of dissatisfaction with a union are not deemed the equivalent of withdrawal of support for the union as the exclusive bargaining representative [citations omitted]." Mere disparaging remarks about a union to management may have been made to incur the employer's favor. *Briggs Plumbingware, Inc. v. NLRB*, supra, 877 F.2d at 1288. In sum, the employer has the burden of proving a good-faith doubt by a preponderance of the evidence and the evidence offered in support of the employer's claim must be "clear, cogent and convincing." *Rock-Tenn Co. v. NLRB*, 69 F.3d 803, 808 (7th Cir. 1995).

As of November 1, Respondent hired 36 employees for employment as production and maintenance employees at the three facilities acquired by Respondent and in issue in this case (G.C. Exh. 1(I), par. 4). The Board has consistently found that evidence of 50 percent or more unit employees not wanting continued union representation is sufficient support for a lawful withdrawal of recognition based on good-faith doubt. *Market Place*, 304 NLRB 995, 1002 (1991). As I look for appropriate evidence in this record that 18 or more unit employees disavowed union representation, I am instructed further by the Board that I should consider only such evidence known to the Employer on or before the date on which the duty arose to recognize and bargain with the Union. *AMBAC International*, supra, 299 NLRB at 506. As noted above, the union demanded recognition and bargaining in a letter dated November 1 and received by Respondent on or about November 2 (G.C. Exh. 3). In a reply letter dated November 10, and received by the Union on the same date, Respondent asserted that because of a "reasonably grounded, good faith doubt based on objective considerations that the union currently represents a majority of the employees in question," Respondent declined to recognize the Union as the employees' exclusive collective-bargaining representative (G.C. Exh. 4). (See also G.C. Exh. 1(I), pars. 6, 7.)

Finally, as I review relevant evidence, the Board also instructs me to be wary of evidence that may be tainted by employer misconduct. *AMBAC International*, supra, 299 NLRB at 507. That is, the evidence must represent the free and voluntary expression of the individual employees' will (I find there is no issue in the instant case involving tainted evidence).

At page 9 of her brief, the General Counsel writes that, "It can be argued that the following 127 unit employees had indicated to Respondent that they did not wish to be represented by the Union before Respondent refused to recognize and bargain with the Union in November, 1994:"

David Wilson	Susan Lynn Allen
Lawrence E. Hutchins	James R. Chapman Jr.
Vernon Lee Davidson	Gerald Roy Penny
Steven Wood	Michael E. Potter
John William	Doug Miller
Lampkins Jr.	Bob Stiles

In the context of her brief, I construe the General Counsel's statement above as a concession and I find that discussion of the testimony with respect to six of the persons listed above is unnecessary.

With respect to Wilson, Penny, Potter, Miller, and Stiles, I will recite the evidence as to them because the Union avers (Br. pp. 6-7) that the evidence as to them is insufficient to show a clear repudiation.

(1) David Wilson testified that in late summer or early fall, while a Unocal employee, he was interviewed by Respondent's area superintendent, Phil Sorbet. During the course of the interview, Wilson brought up the subject of the Union and asked if he were hired by Respondent, would the same union be representing employees as represented them at Unocal. Although a union member at the time, Wilson further told Sorbet that he did not have good feelings about the Union because employees were not getting much for their money. The Union did not have any real strength, Wilson added. Finally, Wilson told Sorbet, whom Wilson was meeting for the first time, that he was unhappy enough with the Union, that he had reservations about taking the job, if the Union were going to be representing employees.

(2) Gerald Penny testified that he joined the Union a few months after being hired by Unocal 11 years prior to November when he started with Respondent. Shortly before being hired by Respondent, Penny was interviewed by Sorbet. At this interview Penny stated he brought up the Union and stated he was not in favor of union representation. Penny explained to Sorbet that in his opinion the seniority system was not efficient. At some point in the conversation, Penny testified, that after he expressed his opinion about the Union, Sorbet stated, we are not going to recognize the Union at this time.

Penny also testified, but apparently did not tell Sorbet, that in early 1990, he and others wrote the Union seeking to resign. The Union refused to permit them to resign and Penny and others filed charges against the Union with the Board. Eventually the members won the right to resign and Penny received a lump sum payment of about \$700 of back dues pursuant to Board order.

(3) Michael Potter⁷ testified that he had worked for Unocal for 9-1/2 years and in July, while working for Unocal, he and other employees attended a meeting with Torch representatives, Phil Sorbet and Randy Bailey, witnesses for Respondent. During the course of the meeting, an employee asked a Torch official if Torch was going to be a union com-

pany and the official answered that the matter was still up in the air. At a subsequent smaller gathering with Respondent officials on the same day, Potter publicly proclaimed that he would prefer not to have the Union represent us "for the acquisition of the property there." (Tr. 493.) At the same meeting, Potter's coemployees, Doug Miller and Bob Stiles who did not testify, also publicly stated to the Torch officials that they too preferred not to have the Union representing them. (According to Potter, all three told the Respondent officials essentially the same.)

Prior to being hired on November 1, Potter was interviewed by a Respondent representative named Gagneaux who did not testify. Potter brought up the Union, asking if any decision had been made regarding union representation. Gagneaux responded that no decision had been made yet. Then Potter added that he preferred not to have one.

Contrary to the Union, I find that Wilson, Penny, and Potter, in their undisputed testimony, clearly showed they were repudiating the Union as collective-bargaining representative. I am less certain regarding Miller and Stiles, who did not testify, although both were current employees. However, on balance, I am satisfied that Respondent met its burden of proof as to them. No adverse inference is appropriate since they were equally available to both sides. *Salisbury Hotel*, 283 NLRB 685, 691 fn. 10 (1987). Moreover, since the issue is whether the employer's reliance on Miller's and Stiles' expression of repudiation was reasonable, I find the failure to call them as witnesses is not fatal to Respondent's case. Cf. *Wilshire Foam Products*, 282 NLRB 1137, 1151 (1987)

With the count thus far, 11 bargaining unit employees opposed to continued union representation, I turn to the remainder of the employee witnesses.

(4) Douglas Schultz testified that he had been a 10-year Unocal employee before his employment by Respondent on November 1. Schultz worked on Irene for most of his tour with Unocal. Prior to being hired by Respondent, Schultz was interviewed by Gagneaux on Irene. Although he could not be certain how the subject of unions arose in the interview, Schultz believes it did and that he raised it. Schultz believes he told Gagneaux that he was not interested in joining the Union if he did not have to. Schultz had never belonged to the Union while working for Unocal. About 1-month later, in a conversation with Hogue on Irene, Schultz essentially reiterated this view.

In agreement with the General Counsel (Br. 11), I find that the evidence with respect to Schultz is not sufficient to justify a reasonable doubt. Under Board law, "majority support" refers to whether a majority of unit employees support union representation and not to whether they are union members. *Manna Pro Partners, L.P.*, 304 NLRB 782, 783 fn. 6 (1991), enfd. 986 F.2d 1346 (10th Cir. 1993).

(5) Danny Gonzalves testified that while a Unocal employee, in September, he was interviewed by Hogue. During the course of the interview, Gonzalves stated that he was not a member of the Union, and he may have added, because he did not like the way they operated. For the same reason stated in (4) above, and because the statements were merely disparaging and not absolutely opposed to representation, *Briggs Plumbingware, Inc. v. NLRB*, supra, 866 F.2d at 1288, I find the evidence with respect to Gonzalves is not sufficient to support a good-faith doubt.

⁷ The General Counsel listed only 11 employee witnesses.

⁸ A list of Respondent's current unit employees also reflects the name of Robert G. Potter, who did not testify (R. Exh. 1).

(6) Michael Spier testified that he had 18 years of seniority with Unocal and could have remained with Unocal had he not been hired by Respondent. Before he was hired on November 1, he was interviewed by Gagneaux and said, if hired, he prefer to keep the same job under Respondent as he was performing for Unocal (safety tester). Spier, a member of the Union, and former steward, added, if it is coming down to the union or nonunion, I want the job and it does not matter to me. I find the evidence as to Spier is not sufficient to support a good-faith doubt.

(7) Robert Spaulding testified that he had worked for Unocal for 21 years and had never belonged to the Union. In late October before being hired by Respondent, Spaulding had a preemployment interview with Sorbet. Spaulding told Sorbet that he had worked for Unocal for 21 years and had never belonged to a union. Spaulding added that he had no intention of belonging to one at a later date. Although Spaulding did not tell Sorbet this, he testified that the reason he said what he did was because in the 20-plus years at Unocal, Spaulding did not see anything positive come from the union, he was not impressed with the Union and never felt it was necessary.

Because Spaulding never made it clear to Sorbet whether he was disavowing union membership or union representation, I find this testimony is not sufficient to support a good-faith doubt.⁹

(8) Pierre De Solminihac testified that he had worked for Unocal for 6 years before being hired by Respondent on November 1. Sometime before, De Solminihac was interviewed by Gagneaux and the subject of union representation came up, although the witness could not recall how. During the interview De Solminihac stated that he did not particularly care for the Union and the way they did things. I find this testimony is not sufficient to support a good-faith doubt.

(9) Edward Jorge testified he had worked for Unocal for 10 years and had never been a member of the Union. In October, Jorge submitted to a preemployment interview with Sorbet who told Jorge that Respondent did not have a union, but did have a pay-for-performance program which he explained. Jorge replied that was fine with him, and he preferred it that way. Jorge continued that based on his 10 years with Unocal, he felt that the seniority system held guys like him back, as they did not have much opportunity to advance.

Sorbet testified for Respondent and testified he could not recall saying to Jorge that Torch was nonunion or intended to operate nonunion (Tr. 566). In light of this testimony, I have little difficulty in crediting Jorge on this point. In *Worcester Mfg.*, 306 NLRB 218 (1992), a case cited by the General Counsel, the employer told employees of certain facts which generated an obligation to bargain, and then told the same employees it would not honor the obligation to bargain. More specifically, Respondent was found to have violated Section 8(a)(1) of the Act by telling employees it would expect to operate nonunion. These facts should be compared to those here where Respondent is not charged with and the General Counsel does not claim that Respond-

ent violated the Act by Sorbet making the statement in question.

I find in disagreement with the General Counsel that Sorbet's statement did not taint Jorge's statement. Moreover, Jorge's statement that he preferred to be nonunion as he disagreed with the [Union-sponsored] seniority system in the context of his own 10 year nonaffiliation with the Union is sufficient to support a good-faith doubt, and I so find.

(10) Keith Schwindt testified that he worked for Unocal for about 14 years before being hired by Respondent. Like the other employees discussed, Schwindt had a preemployment interview with Sorbet, but unlike the other employees discussed, the subject of unions never came up. Instead Schwindt went to a then-Unocal supervisor named Phil Hosh who apparently was hired by Respondent subsequent to speaking to Schwindt. The subject discussed on several different occasions was whether Schwindt's nonmembership in the Union might be detrimental to his chances for getting a job with Torch. Hosh never testified, but I have little difficulty in finding that this testimony was not sufficient to support a good-faith doubt. In fact, it is so lacking in probative value, I am puzzled as to why it was offered at all.

(11) William Hunter Jr. testified that he had been a Unocal employee for 10 years prior to his employment by Respondent on November 1. A nonmember of the Union, Hunter had a preemployment interview with Sorbet prior to hire by Respondent. In the interview Hunter said the Union was holding him down, holding him back with its seniority and qualifications and time with the company. He could not see himself moving up with the Company because of the negotiations between the Union and the Company as far as bidding jobs.

In evaluating Hunter's testimony, I note this exchange on direct testimony:

Q. Why did you feel the need to express how you felt on this particular subject? (i.e. attitude toward the union.)

A. Maybe a little bit had to do with going for a new job, selling yourself to get a new job, and I knew Torch was non-union and it didn't bother me at all. It just basically came out in conversation. [Tr. 472-73.]

Hunter's rationale leaves me with a doubt as to Hunter's sincerity as he spoke to Sorbet. That is, the remarks to management may have been made to incur the employer's favor. *Briggs Plumbingware, Inc. v. NLRB*, supra, 877 F.2d at 1288, citing *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 306 (9th Cir. 1978). Nevertheless, the issue is not what is known to the Employer after the fact, but what was expressed and known by the Employer at the time it refused to recognize and bargain with the Union. I find the evidence as to Hunter is sufficient to support a good-faith doubt.

(12) Carl Abeloe Jr. testified that he had been a Unocal employee since 1982, and was hired by Respondent on November 1. During a preemployment interview with Hogue, Hogue told Abeloe that Torch was nonunion, or was not union represented. Abeloe responded that he had not been a member of the Union at Unocal and that he did not care for the Union. Hogue asked why Abeloe did not care for the Union and Abeloe responded that he most objected to the seniority system. That is, Abeloe explained to Hogue, he did

⁹ In light of my conclusion, it is unnecessary to determine the effect, if any, of Sorbet's statement that Torch would probably be nonunion, in reply to Spaulding's question, "was there a plan to be union or nonunion?"

not like working underneath people that he felt were less qualified than he was.

I find that Abeloe's testimony is sufficient to justify a good-faith doubt.

(13) Robert Ryan testified that he had worked for Unocal for over 20 years before being employed by Respondent on November 1. As Ryan began his preemployment interview with Sorbet, Ryan had a gut feeling he would be offered a job. A member of the Union for over 20 years, Ryan raised the subject of union representation at the interview, saying he did not like the seniority system, because it held individuals back and did not achieve any positive results.

I find that Ryan's testimony like Abeloe's is sufficient to justify a good-faith doubt. Both men focused their remarks on the seniority system, an important aspect of union representation.

(14) Timothy Munoz testified as a witness for the General Counsel that he began working for Unocal in 1977 and was hired by Respondent on November 1. Curiously, Munoz gave little or no testimony regarding his view of union representation and he was never called as Respondent's witness. However other witnesses addressed this point. In a prehire interview with Sorbet, Munoz said, "I can work on my own merit and I didn't need the union to help me get this job, nor did the union help me get the job I have now." Before conducting the interview with Munoz, Sorbet was aware that Munoz was or had been a union steward.

According to Respondent's witness Randy Bailey, Respondent's vice president of production, he had a short meeting with Munoz in July, after a general employee meeting with Unocal employees with respect to the pending Respondent takeover. In this followup meeting, a Unocal official named Alan Sharpnack, who did not testify, introduced Munoz to Bailey. In the subsequent conversation, Munoz noted that he was a union steward, but that the Union was not very strong and that it was consolidating offices, and that there was not a whole lot of support for the Union among employees.

The mere fact that a union steward is relating to an official of the successor what the steward's view is of the union level of support does not show whether that steward does or does not want union representation. It is just as likely that Munoz was complaining that despite his hard work as steward, [some] fellow employees did not support the Union. Considering all of the evidence as to Munoz, I find that the evidence is not sufficient to justify a good-faith doubt.

(15) Jesse Faragan and Mike McNabb. Although both of these persons are currently employed by Respondent (R. Exh. 1), neither testified in the case. However, other witnesses gave testimony as to their purported views of union representation. According to Gary Hogue, Respondent's administrative manager at Santa Maria, California, he interviewed about 12 Unocal employees over 2 days, apparently in late summer or early fall. One of these employees was Faragan who expressed a concern about seniority, a lack of progression.

As to McNabb, Sorbet testified that he interviewed him prior to hire. According to Sorbet "[McNabb] felt he was one of the better employees and had been . . . penalized by not being allowed to show from his performance how he was working."

Q. What, if anything did Mr. McNabb say about whether he wanted to be represented by the IUPIW if he went to Torch.

A. He was—there again, it's hard to remember exactly, but he was probably one of the ones that—the general gist of it was he wanted the opportunity of being able to work in a non-represented work force; that he would not be penalized by the seniority system. [Tr. 526–527.]

I note that in Sorbet's notes of his interview with McNabb (G.C. Exh. 11, p. 3), there is no mention of any antiunion statements at all made in the interview. Based on this fact, the failure of both persons to testify, without any reason given for their absences, and most importantly, the tentative and unpersuasive nature of their statements all convince me that the evidence as to Faragan and McNabb is not sufficient to support a reasonable doubt.

In light of the above discussion, I find that Respondent has failed to meet its burden of proof to show that at the time it refused to recognize and bargain with Respondent, it had a good-faith doubt. (Evidence sufficient as to only 15 bargaining unit employees.) Accordingly, I reject Respondent's defense. See *Phoenix Pipe & Tube*, 302 NLRB 122 (1991), *enfd.* 955 F.2d 852 (3d Cir. 1991).

CONCLUSIONS OF LAW

1. The Respondent, Torch Operating Company, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Union of Petroleum and Industrial Workers, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent is a successor employer to Unocal.

4. Respondent has failed to prove that as of November 2, it possessed a good-faith doubt of the Union's majority status.

5. Since November 2, the Union has been the exclusive bargaining representative of Respondent's employees in the following unit employed in the following California facilities: Platform Irene, Lompoc Oil Field, and the Heating, Separating and Pumping facility.

All production and maintenance employees employed at the three facilities listed above, but excluding guards, office employees, clerical employees, fire and safety inspectors, technicians and supervisors as defined in the Act.

6. Since November 2, Respondent has failed and refused to recognize and bargain with the Union in the unit set forth above, in violation of Section 8(a)(1) and (5) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

¹⁰If 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.

ORDER

The Respondent, Torch Operating Company, Lompoc, California, its officers, agents, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with the Union as the exclusive bargaining representative of its employees employed at Platform Irene, Lompoc Oil Field and the Heating, Separating and Pumping facility in the appropriate unit set forth below:

All production and maintenance employees employed at the three facilities listed above, but excluding guards, office employees, clerical employees, fire and safety inspectors, technicians and supervisors as defined in the Act.

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

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

(a) Recognize and, on request, bargain with International Union of Petroleum and Industrial Workers as the exclusive collective-bargaining representative of all the employees employed at the three California facilities, in the unit described above.

(b) Post at its three business facilities located at Platform Irene, Lompoc Oil Field and the Heating, Separating and Pumping facility at or near Lompoc, California, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the

¹¹ 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."

Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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 fail or refuse to recognize and bargain with International Union of Petroleum and Industrial Workers as the exclusive bargaining representative of the employees in the following appropriate unit with regard to wages, hours, working conditions, and other terms and conditions of employment:

All production and maintenance employees employed at the three facilities located at Platform Irene, Lompoc Oil Field and the Heating, Separating and Pumping facility at or near Lompoc, California, but excluding guards, office employees, clerical employees, fire and safety inspectors, technicians and supervisors as defined in the Act.

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, on request, recognize and bargain collectively with International Union of Petroleum and Industrial Workers as the exclusive bargaining representative of the employees in the appropriate unit described above, with regard to their wages, hours, working conditions, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

TORCH OPERATING COMPANY