

**Gitano Group, Inc. and United States Outerwear, single and joint employers, d/b/a Gitano Distribution Center and United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO.** Cases 22-CA-16127 and 22-CA-16151

September 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY, OVIATT, AND RAUDABAUGH

On February 23, 1990, Administrative Law Judge Julius Cohn issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

On January 24, 1992, the Board scheduled oral argument in this case because the analysis of whether the Respondent's United States Outerwear, North American Underwear, and P.S. Gitano employees should be included in the certified bargaining unit and the application of the Board's accretion, relocation, and/or "spinoff" theories to that analysis present important issues. On February 26, 1992, the Respondent and the General Counsel presented oral argument before the Board.

The Board has considered the decision in light of the exceptions, briefs, and oral argument and has decided to affirm the judge's rulings, findings,<sup>1</sup> and con-

<sup>1</sup> Although we are reversing certain of the judge's unfair labor practice findings, we agree with him that a broad cease-and-desist order is warranted because of the Respondent's history of "frequent and flagrant violations of the Act." In this regard, we note that the Union filed a petition in 1986 to represent all of the full-time and part-time warehouse employees employed by the Respondent (at that time, Orit) at its Edison, New Jersey warehouse. Following an election held June 5, 1987, and a rerun election held August 31, 1987, the Union was certified on September 8, 1987 (the judge stated incorrectly that the Union was certified on September 7). Thereafter, the Board found that the Respondent violated Sec. 8(a)(5) by failing and refusing to bargain with the Union. *Gitano Distribution Center*, 288 NLRB 12 (1988). To protest the Respondent's failure to bargain, the employees struck in November 1987, but unconditionally offered to return to work in December 1987. The Board subsequently found that the Respondent violated Sec. 8(a)(3) by refusing to reinstate the strikers on their unconditional offer to return to work. *Orit Corp.*, 294 NLRB 695 (1989), enf. mem. 918 F.2d 225 (D.C. Cir. 1990). Finally, as noted by the judge, the Respondent was the subject of a contempt proceeding before the U.S. district court because of its continuing refusal to comply with the court's order to reinstate the strikers. As a result of that proceeding, the court issued a consent order on November 26, 1990, in which the Respondent admitted that it had failed and refused to comply with the court's order and had failed and refused to properly reinstate the unfair labor practice strikers.

We also agree with the judge that in the circumstances of this case, where the Respondent has failed to bargain with the Union as the exclusive collective-bargaining representative of the employees in the certified unit, the initial period of certification should be construed to begin on the date that the Respondent begins to bargain in good faith with the Union.

clusions only to the extent consistent with this Decision and Order.

The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off its North American Underwear (NAU) warehouse employees working at its Edison, New Jersey warehouse and by refusing to transfer them to its North Brunswick, New Jersey warehouse when it relocated its NAU operation to that facility. The judge also found, and we agree, that the Respondent violated Section 8(a)(5) by failing to provide the Union with information it requested that was relevant and necessary for meaningful effects bargaining regarding the relocation and the layoff of the NAU employees. The judge further found, and we agree, that the Respondent violated Section 8(a)(5) by failing to bargain with the Union in good faith over the effects of its decision to relocate the NAU work and by failing to notify the Union in a timely manner of this decision.<sup>2</sup> In addition, the judge found, and we agree, that the Respondent violated Section 8(a)(5) by refusing to bargain with the Union regarding the effects of its decision to relocate the P.S. Gitano work from Edison to North Brunswick.

Finally, the judge found that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain with the Union as the representative of all its warehouse employees employed at both its Edison and North Brunswick warehouses. Although we agree with the judge that the Respondent violated Section 8(a)(5) by refusing to bargain with the Union as the exclusive bargaining representative of the unit employees, for the reasons stated below we find that the certified bargaining unit is limited to the Orit employees working at the Edison facility. We also find, as explained below, that the NAU warehouse employees working at the North Brunswick facility constitute a separate bargaining unit, that the Respondent was obligated to recognize and bargain with the Union as the representative of those employees, and that it violated Section 8(a)(5) by failing and refusing to do so. Finally, we find that the Respondent did not have a duty to bargain with the

<sup>2</sup> We agree with the judge that in the circumstances of this case, 2 weeks' notice was not timely. In this regard, we note that the Union first requested bargaining in August 1988 about the effects of the relocation and that the Respondent failed to respond to this request. Although the Respondent continued to plan for the relocation over the next several months and knew at the latest by November that the relocation would occur in late December, the Respondent did not inform the Union of the layoffs and relocation until December 16, 1988, a time when it would be difficult to schedule bargaining meetings because of the upcoming holidays. Thus, the parties did not meet until December 29, only 1 day before the layoff and relocation were scheduled and only 1 week before they actually occurred.

Because the Respondent offered no evidence of "particularly unusual or emergency circumstances" justifying its delay in notifying the Union of its relocation decision, Member Oviatt agrees with his colleagues that 2 weeks' advance notice was insufficient. See generally *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990); *Los Angeles Soap Co.*, 300 NLRB 289 (1990).

Union regarding the United States Outerwear (USO) warehouse employees working at the Edison facility and its P.S. Gitano warehouse employees at North Brunswick and thus did not violate the Act by failing to do so.

The Respondent is a public corporation controlled by the Dabah family, which owns 85 percent of its stock. To the extent relevant here, the Respondent is engaged in the importation and wholesale distribution of wearing apparel. The Respondent is the sole owner of all the stock in Orit Corporation, which distributes, inter alia, women's jeans under the "Gitano" label.<sup>3</sup> One of Orit's subdivisions, P.S. Gitano, distributes proportionally sized jeans for women. In addition to Orit, the Respondent is the sole owner of NAU, a subsidiary that distributes men's and women's intimate apparel.<sup>4</sup> Finally, members of the Dabah family own 100 percent of USO's outstanding stock and control that organization. Although USO is not a subsidiary of the Respondent, it uses the Gitano label under a licensing agreement with the Respondent.

At the time of its formation in 1986, USO imported and distributed coats and outerwear at a public warehouse in Jersey City, New Jersey. Originally, USO employed none of its own warehouse employees. In May 1987, USO moved its operation to the Edison warehouse. By July of that year, USO had hired approximately 20 of its own employees who worked at the Edison warehouse.<sup>5</sup> Also in July 1987, Orit moved its operation to the Edison facility from its Linden, New Jersey warehouse. NAU, which had also operated out of the Linden warehouse, was relocated to the Edison warehouse at the same time. Thus, by the end of July 1987, the Orit, NAU, and USO operations were located in the Edison warehouse.<sup>6</sup>

Prior to USO's move to the Edison warehouse, the Respondent took certain steps to ensure that the USO operation would be separate from its Orit and NAU operations. In this regard, the Respondent erected a fence between the area in which USO was located and

the rest of the facility. In addition, there were separate entrances to the warehouse for the USO employees and they used separate timeclocks and loading docks.

In June 1988, the Respondent leased part of a warehouse in North Brunswick, New Jersey, approximately 12 miles from the Edison facility. The Respondent hired approximately 20 warehouse employees to work at that facility. Over the next several months, the Respondent gradually transferred its P.S. Gitano operation from the Crazy Eddie warehouse to the North Brunswick facility. Because the Orit operation at the Edison warehouse was expanding, the Respondent transferred the employees who had worked at Crazy Eddie's to the Edison facility and hired new employees to perform the P.S. Gitano work at North Brunswick.<sup>7</sup> Finally, in January 1989, the Respondent relocated its NAU operation from the Edison facility to the North Brunswick warehouse. Thus, at all times since January 1989, the Orit and USO warehouse employees have been working at the Edison warehouse and the P.S. Gitano and NAU warehouse employees have been working at the North Brunswick warehouse.

The judge found that the Respondent and USO were a single employer and that the USO employees should be included in the currently certified unit under a traditional community-of-interest analysis.<sup>8</sup> Accordingly, the judge found that the Respondent had a duty to bargain with the Union as the exclusive bargaining representative of the USO employees and that it violated the Act by failing and refusing to do so. We agree with the judge that the Respondent and USO are a single employer,<sup>9</sup> but for the following reasons we disagree with his conclusion that the USO employees should be included in the bargaining unit.

Initially, in order to establish that the Respondent unlawfully refused to bargain as to the USO employees, the General Counsel must first establish that the USO employees are properly included in the certified unit. Thus, the General Counsel is seeking by means of an unfair labor practice complaint to have the Board, in effect, clarify the bargaining unit to include the USO employees. It is well established, however, that when parties to a bargaining relationship, even by mistake, have excluded a group of employees from an established bargaining unit, the Board will not clarify

<sup>3</sup>Because the petition was filed prior to the creation of the Gitano Group in late 1988, Orit was the employer of record when the original petition was filed. We agree with the judge, for the reasons stated by him, that the Respondent and Orit are alter egos.

<sup>4</sup>The judge found that NAU and the Respondent constitute a single employer. There are no exceptions as to this finding and hence we adopt it pro forma.

<sup>5</sup>Although USO's operation at the Edison facility commenced prior to the date of the second election, its employees did not vote in that election. In this regard, it is uncontroverted that at the time of the second election the Union did not know of the USO employees' presence at the Edison facility and did not seek their inclusion in the unit. Consequently, the issue of their inclusion in the unit has not been previously litigated before the Board.

<sup>6</sup>Also in July 1987, the Respondent rented warehouse space at the Crazy Eddie warehouse down the street from its Edison facility. The Respondent housed its P.S. Gitano operation at the Crazy Eddie warehouse until the end of 1988, when it relocated its P.S. Gitano operation to the North Brunswick facility.

<sup>7</sup>None of the warehouse employees who had worked at the Crazy Eddie warehouse was laid off or transferred to the North Brunswick warehouse as a result of the relocation of the P.S. Gitano operation.

<sup>8</sup>The traditional community-of-interest criteria include "distinctions in skills and functions of particular employee groups, their separate supervision, the employer's organizational structure, and differences in wages and hours, as well as integration of operations, employee transfer, interchange, and contacts." *Dinah's Hotel & Apartments*, 295 NLRB 1100, 1101 fn. 3 (1989).

<sup>9</sup>Because he agrees with his colleagues that the USO employees would not constitute an accretion to the bargaining unit, Member Devaney finds it unnecessary to pass on whether the Respondent and USO are a single employer.

the unit to include those employees unless substantial changes have occurred, creating a real doubt as to whether the excluded employees should now be included in the unit.<sup>10</sup> In the present case, the USO employee group was in existence at the time of the second election, the parties did not include them in the bargaining unit, and no “substantial changes” have occurred in the duties and responsibilities of the bargaining unit employees or of the USO employees since the election. In these circumstances, we find that it would be inappropriate to enlarge the unit to include the USO employees.<sup>11</sup>

Further, even if “unit clarification,” by analogy, were otherwise appropriate here, we would dismiss this unfair labor practice allegation because any community of interest the USO employees share with the bargaining unit employees is not so overwhelming as to require their accretion to the bargaining unit. In this regard, we emphasize that the Board has followed a restrictive policy in finding accretion because it is reluctant to deprive employees of their basic right to select their own bargaining representative.<sup>12</sup> Consequently, we will find a valid accretion “only when the additional employees have little or no separate group identity . . . and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted [footnotes omitted].”<sup>13</sup>

In the present case, the judge found it particularly significant that the USO employees “worked fairly closely together” with the unit employees and that “they were all doing the same kind of work.” We

<sup>10</sup> *Union Electric Co.*, 217 NLRB 666, 667 (1975). See also *A-1 Fire Protection*, 250 NLRB 217, 221 fn. 23 (1980), in which the Board stated that “[i]t is well established that the Board will not clarify an established bargaining unit by including employees who might otherwise be appropriately included in the unit if their job classifications were in existence at the time of the certification, recognition, or execution of a collective-bargaining agreement and if their duties have not undergone recent, substantial changes which create real doubt as to their unit replacement.” See further *Copperweld Specialty Steel Co.*, 204 NLRB 46 (1973) (classifications not accreted to the certified unit where, although the disputed classifications were in existence at the time of an election, the employees in those classifications were not included on the *Excelsior* list and did not vote in the election, even if their exclusion was by mistake).

<sup>11</sup> Member Raudabaugh does not pass on the issue of whether it is inappropriate to decide this unit issue in an unfair labor practice case. Assuming arguendo that it is appropriate to do so, he agrees with the conclusion, set forth *infra*, that the USO employees are not a part of the represented unit at Edison.

<sup>12</sup> See *Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969), in which the Board stated that it would not “under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election.” See also *United Parcel Service*, 303 NLRB 326 (1991).

<sup>13</sup> *Super Valu Stores*, 283 NLRB 134, 136 (1987), citing *Safeway Stores*, 256 NLRB 918 (1981). See also *Save Mart of Modesto*, 293 NLRB 1190, 1191 (1989).

note, however, that the USO employees do not work closely together with the Orit warehouse employees at Edison. As noted above, the area of the Edison warehouse occupied by the USO operation is fenced off from the rest of the warehouse. USO employees have separate entrances to the facility and use separate time-clocks and loading docks. Consequently, the USO employees are physically isolated from the Orit employees at Edison. Although the judge correctly found that there were some contacts between the USO and Orit employees, the record indicates that these contacts were for the most part limited to the storage of some of Orit’s merchandise in the USO area and the use by USO of Orit’s hi-lo on an occasional basis.<sup>14</sup>

As to the second factor relied on by the judge, we find that the USO employees perform work different from that of the unit employees. In this regard, USO employees unpack coats and outerwear received at the warehouse and run them through a hanger operation prior to their reshipment. The USO employees use special equipment to perform this operation, for which they are specially trained. The unit employees, by contrast, unpack the apparel that arrives at the warehouse in cartons and repack it in other cartons according to customer orders. They use no special equipment or skills in the performance of this operation. Although the judge found it significant that the USO employees now perform less hanger work than they previously did, we find that this factor, standing alone, does not require the USO employees’ inclusion in the bargaining unit.

Finally, we note that two other factors that the Board has identified as “especially important in a finding of accretion,” i.e., employee interchange and common day-to-day supervision, are absent in the present case.<sup>15</sup> In this regard, it is uncontroverted that there is no interchange or transfer between the USO employees and unit employees. In addition, Rosenthal, USO’s warehouse manager, is in overall charge of day-to-day operations and labor relations for USO while the Orit employees at the Edison warehouse are under the overall direction and supervision of other officials of the Respondent.<sup>16</sup> Thus, as noted above, we conclude that

<sup>14</sup> For the most part, Orit stored merchandise from its *Revista* and *Linea* operations in the USO area. When *Revista* went out of operation in December 1988, its merchandise was stored in the USO area. The *Linea* operation commenced in July 1989. Some of its merchandise came into the warehouse on hangers and was stored in the USO area. As to the hi-lo, Rosenthal, USO’s warehouse manager, testified that USO used Orit’s hi-lo approximately once every 2 weeks for an hour to move cartons onto pallets.

<sup>15</sup> See, e.g., *Towne Ford Sales*, 270 NLRB 311, 311–312 (1984), *affd.* 759 F.2d 1477 (9th Cir. 1985).

<sup>16</sup> As the judge correctly found, Rosenthal reports to both Beida, Orit’s head of operations, and Holman, USO’s president. While Beida did play a significant role in establishing USO’s initial operation, Rosenthal testified without contradiction that he (Rosenthal) now hires employees, determines merit wage increases, disciplines

the USO employees would not constitute an accretion to the bargaining unit.

As to the NAU employees, we agree with the judge that those employees were originally included in the certified bargaining unit at Edison<sup>17</sup> and that, but for their unlawful layoff, the NAU employees would have been transferred to the facility at North Brunswick. We disagree, however, with the judge's conclusion that the NAU North Brunswick employees continue to be a part of the certified Edison bargaining unit as a partial "relocation" or "spinoff" from it. Rather, we find that the Respondent has an obligation to recognize the Union as the representative of a separate unit of NAU employees at North Brunswick for the reasons explained below. As to the P.S. Gitano employees at North Brunswick, the judge found that they also "continued" to be part of the originally certified bargaining unit because the P.S. Gitano operation was "more of a spinoff" from the existing unit than a discrete complement added to it. We disagree.

As an initial matter, we announce today that when an employer transfers a portion of its employees at one location to a new location, we will no longer define the nature of the transfer in terms of the relationship between the "new" unit and the "old" unit (i.e., whether one is a "spinoff" or "partial relocation" from the other). Rather, we will begin with the Board's long-held rebuttable presumption that the unit at the new facility is a separate appropriate unit.<sup>18</sup> Assuming that that presumption is not rebutted, we will then apply a simple fact-based majority test to determine whether the respondent is obligated to recognize and bargain with the union as the representative of the unit at the new facility. If a majority of the employees in the unit at the new facility are transferees from the original bargaining unit, we will presume that those employees continue to support the union<sup>19</sup> and find that the employer is obligated to recognize and bargain with the union as the exclusive collective-bargaining representative of the employees in the new unit. Ab-

sent this majority showing,<sup>20</sup> no such presumption arises and no bargaining obligation exists.<sup>21</sup>

We have decided to abandon the "partial relocation" and "spinoff" analyses in favor of this "majority" test for two reasons. First, we believe that the terms "partial relocation" and "spinoff" have been applied with such increasing elasticity in the employee transfer context that they have lost any specific meaning and are therefore no longer precise and useful analytical terms.<sup>22</sup> Second, we find that the use of these terms has resulted in an analytical framework focusing on the continuity between the "old" and "new" units rather than on the correct focus, balancing the rights of the new employees against those of transferees to the new location.<sup>23</sup> Thus, we believe that the test

<sup>20</sup> If, as here, with respect to the NAU employees, former bargaining unit employees would constitute a majority of the employees at the new facility but for the employer's unlawful refusal to transfer those employees to the new facility, or where an employer unlawfully refuses to hire them at the new facility, we will find that the union's majority status presumptively would have continued at the new facility. See, e.g., *State Distributing Co.*, 282 NLRB 1048, 1048 (1987).

<sup>21</sup> Because the new facility is presumptively a separate unit, we would view as irrelevant to the analysis the question of whether or to what extent the employees at the new facility are performing work that previously was performed by the unit employees at the old facility.

The issue of whether an existing contract would be applicable to the new facility is not before us in the present case. However, if the new facility is a separate unit, it would appear that the contract would not apply, without an agreement that it would apply. See *Kroger Co.*, 219 NLRB 388 (1975).

<sup>22</sup> This is especially true of the term "spinoff." In *Coca-Cola Bottling Co. of Buffalo*, 299 NLRB 989 (1990), enfd. 936 F.2d 122 (2d Cir. 1991), for example, the Board found that the respondent's Orchard Park facility was a spinoff from its Tonawanda warehouse operation although only one of the four employees at Orchard Park transferred from a unit position at Tonawanda to a unit position at Orchard Park. Further, in *Overnite Transportation Co.*, 306 NLRB 237 (1992), the Board found that the respondent's new Palatine facility was "an extension of, or a spinoff from" its Bedford Park truck terminal when only 16 of the 33 drivers at the new facility, or less than a majority, were transferees from the Bedford Park terminal. In reaching these conclusions, the Board relied on other factors besides the number of employee transfers to find spinoff. In finding that the employee transfer analysis should center only on whether the transferees form a majority of the new unit, we today overrule *Coca-Cola* and *Overnite Transportation* to the extent that they are inconsistent with this decision. Finally, we consider that the present case represents the *reductio ad absurdum* of the spinoff analysis espoused in *Coca-Cola* and *Overnite* because here the judge has found that the P.S. Gitano employees, none of whom were ever in the bargaining unit, constitute a spinoff from it.

<sup>23</sup> As the Board explained in the context of accretion, "The Board's fundamental concern . . . is to insure that in cases where such an issue is raised the right of interested employees to determine their own bargaining representative will not be thwarted." *Safeway Stores*, 256 NLRB 918 (1981). Under the old analysis, undue emphasis on the continuity between the "old" and "new" units led to a misplaced emphasis on the transferees' Sec. 7 rights to the exclusion of the rights of the new employees. Thus, as explained above, the Board found that new units were "extensions" or "spinoffs"

*Continued*

and discharges employees, assigns work, and hears employee grievances.

<sup>17</sup> In this regard, we note, as stated above, that the petitioned-for unit originally included "[A]ll full-time and part-time warehouse employees employed by the employer at its Edison, New Jersey warehouse" and that the NAU employees voted in both elections. There is no dispute that these employees were included in the unit when they worked at the Edison facility.

<sup>18</sup> See, e.g., *Haag Drug Co.*, 169 NLRB 877 (1968).

<sup>19</sup> See generally *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 37-38 (1987).

which we announce today will both restore the employee transfer analysis to its proper focus and serve as a more workable and precise analytical tool to guide employers, unions, and employees to an understanding of their rights and obligations in this difficult area of the law.

Applying this test to the facts of the present case, we find first that the presumption of the separate appropriateness of the North Brunswick facility has not been rebutted.<sup>24</sup>

Further, we find that the NAU employees at North Brunswick constitute a separate unit from the P.S. Gitano employees there. In this regard, we note that the two employee groups have always been separate and distinct, that the existence of the P.S. Gitano employee group at North Brunswick predated the arrival of the NAU employees there by some 6 months, and that after the arrival of the NAU employees the two groups remained separated by a wall, had no day-to-day contact, and retained separate supervision.

Finally, we find that the Union had majority status in the NAU unit. As noted above, but for the Respondent's unlawful layoff of the NAU employees working at Edison, those employees would have constituted a majority of the employees in the NAU North Brunswick bargaining unit and presumptively would continue to support the Union. Accordingly, under the majority test announced above, we agree with the judge, albeit for different reasons, that the Respondent was obligated to recognize and bargain with the Union as the exclusive collective-bargaining representative of the NAU employees working at the North Brunswick facility and that it violated Section 8(a)(5) by failing and refusing to do so.

With regard to the P.S. Gitano employees at North Brunswick, we found, *supra*, that this employee group also constitutes an appropriate unit, separate and distinct from the certified Edison unit and from the NAU unit. In determining whether the Respondent is obligated to recognize and bargain with the Union as the representative of the P.S. Gitano unit, we find it determinative that none of the employees at issue are transfers from the Edison bargaining unit; rather, they are all new employees hired to work at North Brunswick. Consequently, we find that under the majority test the Respondent has no obligation to recognize the Union as the representative of the P.S. Gitano North Brunswick employees.

from the original units even when less than a majority of the employees at the new facility were transferees.

<sup>24</sup> Indeed, there is evidence that affirmatively supports the separateness of the North Brunswick facility. In this regard, we note that the North Brunswick facility is some 12 miles from the Edison warehouse and that the day-to-day operations at the two facilities are totally separate. Further, there is no interchange or day-to-day contact between the Edison unit employees and the North Brunswick employees and they are separately managed and supervised.

In sum, applying the new majority test, we find that the NAU employee group at North Brunswick constitutes a separate appropriate unit, that the Respondent was obligated to bargain with the Union as their representative, and that the Respondent violated Section 8(a)(5) by failing and refusing to do so. We also find, for the reasons explained above, that the Respondent had no obligation to recognize and bargain with the Union as the representative of the USO employees at Edison or the P.S. Gitano employees at North Brunswick, and that it did not violate the Act by refusing to bargain with the Union concerning those employees.

#### ORDER

The National Labor Relations Board orders that the Respondent, Gitano Group, Inc. and United States Outerwear, Single and Joint Employers, d/b/a Gitano Distribution Center, Edison and North Brunswick, New Jersey, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO, or any other labor organization, by laying off or refusing to transfer any of its employees, or by discriminating in any other manner in regard to their hire and tenure of employment, or any term or condition of employment.

(b) Refusing to bargain collectively, on request, with the Union as the exclusive representative of employees in the following appropriate units:

All full-time and regular part-time Orit warehouse employees employed by the employer at its Edison, New Jersey warehouse, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

All full-time and regular part-time NAU warehouse employees employed by the employer at its North Brunswick, New Jersey warehouse, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(c) Failing to bargain with the Union over the effects on unit employees of its decision to relocate the NAU and P.S. Gitano operations, and its decision to lay off NAU employees and to refuse transfer of them from its warehouse at Edison to its warehouse at North Brunswick, New Jersey.

(d) Failing to comply in a timely and adequate manner with the Union's request for information relevant and necessary to the Union's functioning as the collective-bargaining representative of the unit employees, concerning the effects of its decision to transfer bargaining unit work.

(e) In any other 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) Offer to all employees who were laid off from its NAU Division at Edison, New Jersey, on or after January 6, 1989, and refused transfer to North Brunswick, New Jersey, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions at either the Edison or North Brunswick, New Jersey warehouses, without prejudice to their seniority or other rights and privileges, and make them whole for lost earnings and other benefits in the manner set forth in the remedy section of this decision.

(b) On request, recognize and bargain with the Union as the exclusive representative of the employees in the appropriate units described above, excluding USO employees at Edison, New Jersey, and P.S. Gitano employees at North Brunswick, New Jersey, on terms and conditions of employment and, if understandings are reached, embody those understandings in signed agreements.

(c) On request, bargain with the Union over the effects on unit employees of Respondent's decision to relocate to North Brunswick, New Jersey, the NAU and P.S. Gitano operations, and its decision to lay off NAU employees and to refuse transfer of them from the Edison, New Jersey warehouse.

(d) Furnish the Union in a timely and adequate manner with the information it requested concerning the effects of the Respondent's decision to transfer bargaining unit work.

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

(f) Post at its principal office and at its Edison and North Brunswick warehouses copies of the attached notice marked "Appendix."<sup>25</sup> Copies of the notice, on forms provided by the Regional Director for Region 22, 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 Respondent to

ensure that all said 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.

## APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT discourage membership in United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or any other labor organization, by discriminating against our employees in regard to their hire and tenure of employment or any other term or condition of employment.

WE WILL NOT refuse to bargain, on request, with the Union as the exclusive representative of employees at our warehouses at Edison and North Brunswick, New Jersey in the following appropriate units:

All full-time and regular part-time Orit warehouse employees employed by the employer at its Edison, New Jersey warehouse, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

All full-time and regular part-time NAU warehouse employees employed by the employer at its North Brunswick, New Jersey warehouse, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT fail to bargain with the Union over our decision to lay off and not transfer the NAU employees at Edison, New Jersey, and over the effects of our decision to transfer the bargaining unit work of NAU and P.S. Gitano from Edison, New Jersey, to our North Brunswick warehouse.

WE WILL NOT fail to comply in a timely and adequate manner with the Union's request for information relevant and necessary for the Union's functioning as

<sup>25</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."

the collective-bargaining representative of the unit employees concerning the effects of our decision to transfer NAU bargaining unit work and to lay off NAU employees at Edison, New Jersey.

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

WE WILL offer all employees who were laid off from our NAU Division at Edison, New Jersey and refused transfer to North Brunswick, New Jersey, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions at either the Edison or North Brunswick, New Jersey warehouse, without prejudice to their seniority or other rights or privileges previously enjoyed.

WE WILL make whole those employees for any loss of pay or other benefits suffered as a result of discrimination against them, with interest.

WE WILL bargain, on request, with the Union as the exclusive representative of the employees in the appropriate units and put in writing any agreements reached on terms and conditions of employment.

WE WILL, on request, bargain with the Union concerning the effects of our decision to relocate the NAU and P.S. Gitano operations from Edison to North Brunswick, New Jersey, and our decision to lay off the NAU employees and refuse transfer of them to North Brunswick.

WE WILL furnish the Union with the information it requested concerning the effects of our decision to transfer bargaining unit work.

GITANO GROUP, INC., AND UNITED STATES OUTERWEAR, SINGLE AND JOINT EMPLOYERS, D/B/A GITANO DISTRIBUTION CENTER

*Marguerite R. Greenfield, Esq.* and *Wayne Eastman, Esq.*, for the General Counsel.

*Adin C. Goldberg, Esq.* (*Spengler, Carlson, Gubar, Brodsky and Frichling*), of New York, New York, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge. This proceeding was tried in Newark, New Jersey, from October 2 through 5 and 13, 1989. Upon charges filed in Case 22-CA-16083 by United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (the Union), the Regional Director for Region 22 issued a complaint on January 30, 1989. Thereafter upon charges filed by the Union in Cases 22-CA-16127 and 22-CA-16151, the Regional Director issued an order consolidating cases and consolidated complaint on June 27, 1989, alleging that Gitano Group, Inc., and United States Outerwear Corp. (Respondent and USO),

respectively, as single and joint employers, had violated Section 8(a)(1), (3), and (5) of the Act.<sup>1</sup> Basically the complaint alleges that Respondent violated Section 8(a)(3) of the Act by laying off employees, supporters of the Union, in one of its divisions and then refusing to transfer them to a new warehouse to which this division had relocated. It is also alleged that Respondent violated Section 8(a)(5) by failing and refusing to bargain with the Union concerning the effects of the transfer of that particular division, and further, by failing to provide information relative to effects bargaining. It also alleged Respondent's failure to recognize the Union as representative of employees in its new facility at North Brunswick, New Jersey. Finally it is alleged that the Union refused and failed to recognize the Union as representative of employees of USO. Respondent filed an answer generally denying the commission of unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. General Counsel and Respondent submitted briefs which have been carefully considered.

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

## FINDINGS OF FACT

### I. JURISDICTION

Gitano Group, Inc. is a public corporation with a principal place of business in New York, New York, which operates and controls through wholly owned divisions and subsidiaries, various showrooms in New York, New York, and warehouses in New Jersey. At the latter it is engaged in the business of warehousing and distributing ladies jeans, underwear, outerwear, and other apparel from its Edison, New Jersey warehouse. During the last 12 months Respondent, through its subsidiaries, particularly Orit Corporation, distributed apparel from both Edison and North Brunswick, New Jersey to States outside the State of New Jersey. The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.<sup>2</sup>

### II. THE LABOR ORGANIZATION INVOLVED

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

### III. THE UNFAIR LABOR PRACTICES

#### A. Background

Respondent, Gitano Group, Inc., a public corporation, is controlled by the Dabash family who collectively owns 85 percent of its stock. The principal officers and directors of this corporation are all members of the Dabah family. According to its annual corporate report, Gitano Group, Inc. is

<sup>1</sup> At the hearing on October 2, 1989, the parties executed an informal settlement agreement in Case 22-CA-16083 approved by the administrative law judge, and that case was severed from this proceeding.

<sup>2</sup> The Board has taken jurisdiction over Orit, as noted above, a wholly owned subsidiary of Gitano Group, Inc., in prior cases reported at 288 NLRB 12 (1988), and 294 NLRB 695 (1989).

a marketer, designer, manufacturer, distributor of "branded apparel sold under the Gitano trademark." The aspect of its operation principally involved in this proceeding is the wholesale distribution of apparel. Respondent is the sole owner of all of the stock of Orit Corporation which distributes mostly women's jeans and other related clothing bearing the "Gitano" label. Orit and other subsidiaries have a central distribution warehouse located in Edison, New Jersey. Since June 1988 Orit and other divisions of Respondent also began operation of another warehouse facility in North Brunswick, New Jersey.

Besides Orit, the subsidiaries and divisions of Respondent principally involved in this proceeding are North American Underwear Company (NAU) and United States Outerwear Company (USO). NAU is a wholly owned subsidiary corporation of Respondent. On the other hand, USO is controlled by members of the Dabah family who own 100 percent of its outstanding capital stock. USO, which manufactures and distributes outerwear, operates out of Edison warehouse, and is licensed by Respondent to use the "Gitano" trademark with respect to the outerwear it distributes. License agreements provide that USO pay Gitano a royalty on the basis of net sales of its products. Pursuant to a service agreement between Gitano and USO, the former provides data processing, collection, warehousing, shipping, and related services to USO who pays Gitano a percentage of its net sales.

Almost all of the finished goods which are made in Asia and other places around the world are sent by either ship or plane to the main warehouse in Edison. For almost 2 years up to December 1988 the Respondent had space at a Crazy Eddie warehouse which was located very close to the Edison warehouse; and since June 1988 new warehouse space was leased at North Brunswick. From Edison the merchandise would be shipped to Respondent's retail customers. The Edison warehouse is also the administrative center for Respondent and all of its subsidiaries and divisions. The administrative services were largely performed by Orit personnel at Edison and that office took care of personnel matters, payrolls, receiving of goods, shipment of goods and accounting, all of which were entered in a large mainframe computer at Edison. Thus, the leasing of the North Brunswick facility in June 1988 was mainly for the purpose of obtaining additional warehouse space, which would not be too far from Edison.

In addition, relevant to this proceeding, is a history of Board and court proceedings involving Respondent, usually under the name of Orit Corp., which occurred prior to the formation of the holding company and the public stock issue. After the filing of a petition by the Union in 1986, and a Decision and Direction of Election in a unit of all Edison warehouse employees, an election and a rerun, the Union was certified on September 7, 1987. Respondent, in order to contest the certification, refused to bargain with the Union. The Board thereafter found that the respondent (Orit) had violated Section 8(a)(5) of the Act. (288 NLRB 12 (1988).) While this matter was pending, the employees engaged in a strike in November 1987. In December of that year Respondent refused to reinstate the strikers who had made an unconditional offer to return to work. Charges respecting this refusal to reinstate were filed, a complaint issued on that matter, as well as others, and a hearing was scheduled before an administrative law judge. In the interim the General Counsel

applied for an injunction in the U.S. District Court pursuant to Section 10(j) of the Act, and the court ordered reinstatement of the strikers pending a final Board Order. *Pascarella v. Orit Corp.*, 705 F.Supp. 200 (D.N.J.1988). This injunctive order was affirmed by the Third Circuit, 866 F.2d 1412 (3d Cir. 1988). Thereafter Respondent apparently refused to properly reinstate these unfair labor practice strikers, and contempt proceedings were initiated by the Board before the U.S. District Court which again ordered Respondent to reinstate. With regard to the complaint alleging unlawful refusal to reinstate the unfair labor practice strikers, the Board issued its Decision ordering Orit to take this action. *Orit Corp.*, 294 NLRB 695 (1989). Enforcement of this order is presently pending before the Third Circuit.

#### B. Unit Issues

Basic to the finding of an unlawful refusal to bargain, there must be a determination of an appropriate unit. The Board has done this in the representation proceedings and the subsequent refusal to bargain referred to above, finding the appropriate unit as follows:

All full-time and regular part-time warehouse employees employed by the employer at its Edison, New Jersey warehouse, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.<sup>3</sup>

At the time of the filing of the first representation petition, the employer was Orit Corporation, inasmuch as the public holding company had not yet been formed, and it maintained a warehouse at Linden, New Jersey. In the course of the processing of this petition, Respondent moved to the Edison warehouse. Both at Linden and continuing in Edison, NAU was assigned one of the areas. It is undisputed that NAU, a separate corporation, is 100-percent owned and controlled by Respondent, and prior to Respondent's origination, by Orit. Moreover NAU employees voted in both elections conducted in 1987. There is really no question that the NAU employees were part of and included in the unit of all warehouse employees at Edison.

The other unit issue concerns the USO employees which the General Counsel contends should also be part of the Edison warehouse unit. USO is a wholly separate corporation. However the same members of the Dabah family who control Respondent, own 100 percent of the stock of USO and are officers and directors just as they are in Orit and Respondent. USO was formed in May 1986 and has been in the business of importing and selling coats and other outerwear. For a period of time it operated from a public warehouse in Jersey City but employed none of its own warehouse workers. According to Albert Beida, currently vice president of operations of Respondent, who formerly held the same position for Orit Imports, USO commenced its move to the Edison warehouse in May 1987 and became fully operational in July of that year, having hired approximately 20 employees. Fred Rosenthal, the warehouse manager for USO, was hired by Beida and worked with him in preparing a budget, installing equipment, and setting up the distribution system. USO had at the outset, a complete hanging operation, so that the

<sup>3</sup> 288 NLRB 12 (1988).

outerwear was received and then shipped to customers on hangers and special equipment was needed for that purpose. Although Respondent has urged that this makes the USO operation greatly different from that of Orit and other divisions of Respondent, all of whom received and shipped goods in cartons, it was later conceded that as USO's business expanded and evolved, it is now approximately done with 80 percent in cartons and only 20 percent on hangers. With regard to shipments whether by hanger or in carton, it should also be noted at this point that USO, apart from having the same stockholders, officers and directors as Respondent, also does its selling and shipping to the same customers.

USO has a licensing agreement with Gitano Licensing Ltd., a wholly owned subsidiary of Orit Corporation, by which it is enabled to use the Gitano trade name in return for which, among other things, Orit has rights of approval over products and items such as advertising. In addition there is a service agreement between USO and Respondent whereby the latter provides "electronic data processing, collection, warehousing, shipping and related services." Besides the royalty USO pays on the licensing agreement, it also pays 7 percent of its net sales to Respondent for these additional services.

According to Rosenthal, he reports to both Beida and the USO president, William Holman. It appears that the latter whose office is in the New York showroom, is basically responsible for sales and production of the merchandise. There is no indication in the record that Holman has anything to do with the warehouse operation of receiving and shipping of merchandise. As to this, Rosenthal reports strictly to Beida who approves all of the hiring, setting of wages and the budget. Beida himself states that the USO budget, which he works out with Rosenthal, is ultimately given to Stan Greenstein, the chief financial officer of Respondent.

USO began operations to a full extent in July 1987 at Edison, occupying approximately 40,000 square feet. It was set up in a portion of the warehouse, and a wall and fence was erected which separated the USO employees from the Orit employees at the warehouse. The operation began between the first and second of the elections in 1987. In this connection Rosenthal claimed that he was not aware of the elections going on but later contradicted his own testimony and admitted that he knew and was at the warehouse during the second election in August. Of course the USO employees did not vote in the election and the Union was not aware of their presence. Since the *Excelsior* list was increased during the interval between the elections, the Union was not advised that there were still some new employees, such as the USO crew, besides those added to the list.

Almost all of the warehouse employees did similar work whether they worked for Orit, USO, NAU or some of the other divisions located there. Basically they worked as ticketers, order pickers, packers, and shippers. While Respondent claims that the USO employees were especially trained in the hanger operation and the bagging machines used for it, it appears that other divisions such as NAU, Linea, and Revista also shipped garments on hangers. It is clear that the NAU and Linea employees were concededly part of the bargaining unit. Nevertheless, Respondent not only separated the USO employees by the wall and fence, but gave them different working, lunch and break hours. In addition the USO employees were granted a better package

of benefits, which normally was given only to the office clerical employees.

While obviously Respondent was attempting to keep USO and Orit employees apart, there was in any case, some contact. For a period of time NAU had its returns department, and Linea stored merchandise, in the USO AREA. NAU employees use the USO bagging machine and were trained by Rosenthal to do so. Also for a period of time USO employees handled skirts and blouses prior to the beginning of the Linea line. At the request of USO, a hi-lo operator of Orit would move USO merchandise as needed.

Rosenthal testified that prior to the August election he met with Orit's personnel manager, Kolko, and Beida, and was told that USO employees were not part of Gitano and would not vote in the upcoming election. Beida told him that USO started as a separate entity and operated as such and its employees would therefore not participate in the vote. Rosenthal also stated that during some discussions he had with USO employees he tried to show them that they were getting benefits different and better than Orit employees.

Based on the foregoing I find first that Respondent and USO constitute a single employer. Clearly the Dabah family owns and operates not only Orit, but also USO. They constitute the officers, directors, and of course, stockholders. Respondent's vice president Beida completely supervises the USO operation. Although Rosenthal was designated as manager of the USO, Beida reviews his budget, sets starting wage rates and benefits for all warehouse employees, including USO. It is quite apparent in the instant case there is not only common management, but also central control of labor relations and common ownership, practices that are considered crucial in a finding of a single employer. See *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255 (1965). Respondent relies heavily on the fact that there is little or no employee interchange between USO and Orit. In such a situation, however, the Board has found that 90-percent stock ownership plus the same officers and directors, and centralized control of "general labor policy" and operations result in a single employer holding. *VIP Radio*, 128 NLRB 113 (1960).

Having found single employer, it must still be determined whether USO employees should be considered part of the appropriate unit at Edison. In this regard, centralized management, supervision and centralized control of labor relations and hiring, as well as community of interest, are the important factors. Central management of USO as well as the other subsidiaries of Respondent is quite clear since in all cases the Dabah family is at the top of the ladder and in firm control. Moreover on the scene at Edison, Beida, vice president of Respondent appears to have ultimately controlled the labor relations of the employees of all the companies and divisions operating there. As vice president for operations of Respondent, Beida provided the centralized control of labor relations with respect to hiring, wages, and other matters regarding the employees. As noted, Rosenthal, the warehouse manager of USO, reported to Beida. In addition the personnel managers of Orit at the warehouse frequently provided employees as needed, for USO. Moreover the payroll, computer, and various other administrative services were all provided by Gitano for USO, for which Orit charged USO.

Of course community of interest is in addition very important. Respondent relies principally on the fact that there was

little or no interchange of employees between USO and Orit or other divisions at Edison. On the other hand despite the existence of a fence or wall, the employees worked fairly closely together. Most important was that they were all doing the same kind of work. This included the ticketers, pickers, packers, and shippers who were the vast majority of the employees together with a few other specialized workers. As shown above the difference due to the hanger operation has been minimized by the gradual change in USO operation to carton shipments. If an employee then is packing a carton there is very little difference in the operation when that employee includes a hanger or does not.

Finally it appears from the record that prior to the election in 1987 Respondent made a special effort to separate USO employees from the other warehouse employees. Thus it erected the fence, established the superior clerical benefit plan for USO employees, and invited USO employees to attend a picnic for the clerical workers. It is difficult to perceive that the relatively unskilled USO warehouse employees would have the same interest as the office clerical employees. As evidence of Respondent's intent in this regard, it used these benefit factors as a means of demonstrating to USO employees, during the preelection campaign, that they were better off than the rest of the employees in the warehouse. Then management was able to tell the voters that, by defeating the Union, they too could receive benefits now being given to USO employees. Apparently this ploy did not succeed inasmuch as the Union won the election by a huge majority, so that the 20 USO employees, even if they had voted would not have been decisive. In sum I find that USO employees working in Edison would have sufficient community of interest with the other warehouse employees so as to be included in the unit. See *South Prairie Construction Co. v. Operating Engineering Local 627*, 425 U.S. 800, 803-805 (1976). Accordingly, I find that all warehouse employees of USO shall be included in the Edison unit.

### *C. The Layoff of NAU Employees and Refusal to Transfer Them to North Brunswick*

As previously noted, Respondent commenced operations in the new facility at North Brunswick approximately in June 1988. Shortly thereafter, NAU Warehouse Manager Gabay, having determined that his operation required more space than available at Edison, and a move should be made by NAU to new and more adequate space at North Brunswick. In August, Gabay met with and told the NAU employees that the operation was to be transferred to North Brunswick. He asked them whether they would be willing to work in that location. It appears, and according to employee Collado, who testified credibly, that the employees were not particularly happy with the prospect of the move because of the possible transportation problem, but no one indicated that they would not work there. During the discussion with Gabay there was some talk about obtaining a bus that would take them to North Brunswick such as Respondent provided for some employees coming from Brooklyn, New York. The bus transportation never did materialize but, on the other hand, there is no evidence that employees said they would not travel to North Brunswick.

During the same month, the Union, having been informed by the NAU employees of the prospective move, wrote a letter, dated August 11, in which it requested bargaining with

Respondent concerning the effects of this relocation. At this point in time Respondent was not engaged in any bargaining regarding any of the unit employees at Edison and did not respond to this letter. Frank Hoefert, the union organizer, testified that after a telephone call in early December, he met on December 12 with Respondent's counsel to discuss the negotiation procedures for the Orit employees at Edison. Nothing was mentioned at this meeting of any change with respect to NAU employees. Then by letter dated December 16, Respondent's counsel informed the Union that it intended to close NAU at Edison on or about December 30, 1988, and lay off all "unit employees" at that time. It further states that NAU would relocate to a larger facility in North Brunswick, and concluded by stating that it would discuss the effects of the closing, should the Union wish it. This being the holiday season, a meeting was not arranged until December 29, at which the Respondent again advised that it was moving NAU to North Brunswick and would lay off all NAU employees at Edison. The Union's position was that it represented NAU employees and requested Respondent to recognize and bargain with it at North Brunswick. Respondent merely replied that its position was that it would not recognize the Union or transfer the employees to North Brunswick, but would discuss the effects of the layoff at Edison.

During this meeting, Respondent told the Union that it had been operating in North Brunswick since June and that there were about 25 employees there at present, and this would probably increase to 60 or 65. It also indicated that there was a possibility that some of the laid-off employees would be hired at North Brunswick. Actually the 25 employees referred to as currently working at North Brunswick were Orit or Gitano employees, some of whom had actually been transferred from Edison and the rest were new hires. At the December 29 meeting Respondent did not mention that in North Brunswick approximately six new NAU employees were hired on December 28, the day before the meeting, in addition to eight previously. This appears from lists of NAU employees hired at North Brunswick furnished later by Respondent. According to Attorney Giblin, who represented the Union and was present at the December 29 meeting, the Company confirmed that work being performed in Edison was also being done in North Brunswick since June, that it was the same work, the same company. This was undoubtedly P.S. Gitano work by Orit employees. However the statement by Giblin regarding a shut down at Edison and transfer to North Brunswick, referred to NAU. Respondent also stated that it expected the NAU operation to grow to 60 or 65 employees and that it may entertain a request for transfer of laid-off employees to take some of those additional positions at North Brunswick. It was also determined that there would be another meeting on January 5 or 6.

Attorney Giblin also testified to the effect that he had a telephone conversation on January 4 with Respondent's attorney who stated that he would entertain a preferential hiring application by Edison people for 30 North Brunswick jobs. However this was coupled with a statement that there was no way Respondent was going to recognize the Union in North Brunswick.

There was another meeting on January 5, 1989. Despite the statement about rehire, the lists of new employees received in evidence indicate that a number of NAU employees were hired at North Brunswick on January 3 and 4, 1 or 2

days prior to this meeting, as also occurred before the December 29 meeting. At the January 5 meeting the Union requested information as to the names and addresses, etc. of employees at North Brunswick which Respondent promptly refused. The Union gave Respondent an application, in writing, for employment for all laid-off employees at Edison but the Company said while it would give them priority, it would not give them hiring rights. Beida, who was present at this meeting, mentioned that North Brunswick had commenced its operations in June because the Company needed more room at Edison for USO. This being the first time the Union heard of USO, Hoefert asked for a list in writing of all divisions besides Orit located in Edison. Respondent never sent such a list, but it did concede that USO was there, although not part of a bargaining unit, and that USO employees had not voted in the election.

Beida then said that a large order was received in early October which created a lot of work for NAU, and its employees both at Edison and North Brunswick were working on this order. He then stated that shipment on this order was winding down, and there would be a reduction in the work force. According to Hoefert, Beida said they would lay off Edison employees but retain the ones in North Brunswick, although perhaps 20 or 25 employees at Edison would be offered jobs at North Brunswick.

With regard to the total application for employment and Respondent's supposed grant of hiring rights, the Union inquired if Respondent would use seniority. but the reply was that the factors for transfer or rehire would be productivity and ability. If all things were otherwise equal, it may consider seniority. Respondent also rejected the Union's contention that senior employees at Edison had demonstrated their ability and should presumably be more qualified than those who may have just started at North Brunswick. The January 5 meeting ended with Respondent telling the Union that the layoff would commence the following day.

NAU laid off most of its Edison employees on January 6, 1989. According to lists furnished by Respondent and received in evidence, NAU employed 74 at Edison just prior to the layoff. Sixty-four were laid off on January 6 and the rest were retained for a short period of time to complete the large Wal-Mart order. As soon as it was finished, NAU was completely closed down at Edison, and its operations transferred to North Brunswick. As of January 16, 1 NAU employee was recalled to work at North Brunswick, and 11 were given jobs to work in special projects of Orit at Edison. By February 3, NAU recalled seven others to work at North Brunswick. The records further show that as of March 27, 1989 there were 45 new employees hired at New Brunswick between January 3 and March 17. Curiously, none of the transferred employees from Edison to North Brunswick took part in the November 1987 strike, which had been found by the Board to be an unfair labor practice strike. Since the strikers had been employed at least since 1987 and had a good deal of seniority, it would seem that some of them should have been competent enough, in accordance with the Respondent's asserted policy of productivity, to work at North Brunswick prior to the hiring of new people off the street.

Joseph Gabay, warehouse manager of NAU, testified that early in his tenure at Edison he had determined that the space there was insufficient. Soon after becoming aware of

the North Brunswick facility, he spoke to Beida about it and eventually obtained authorization from Beida to proceed with construction of the space set aside in North Brunswick. Gabay states that in September he met with employees, and discussed with them the move to North Brunswick which he indicated was a certainty. Although he said that some of the employees expressed concern with the transportation problem, he conceded that others at the meeting said they were interested in the move. There is no evidence that employees said they absolutely would not move to North Brunswick. Final approval from top management to this move was delayed because they were busy with the details respecting Respondent going public as a corporation. However approval did come through and the contractor began working on the North Brunswick space in mid-November and concluded in late December.

Gabay said that the first employees he hired for North Brunswick were former employees of his at his prior position with another company. He hired 12 of these people in December, claiming they were needed because of the volume of work he had at the time. I find that Gabay's testimony with regard to the hiring of new employees and layoff of the old employees to be incredible. He talks about hiring new people at North Brunswick as early as December 27 and into early January because of the volume of work. On the other hand he stated that the ticketing for the big Wal-Mart order was completed by January 3. At another point he said that in December when he hired a lot of people, he had no idea that there was going to have to be a layoff. Yet he had no explanation as to the December 16 notice sent by Respondent to the Union that there was going to be a layoff at the end of December. Finally if one were to include the number of new employees hired and then fired for incompetence or other reasons, the total reached over 100 by June 1989. During this entire period of time Respondent only recalled 15 of the laid-off employees from Edison most of whom were not only experienced but obviously capable enough since they had not been discharged for lack of ability.

In sum I find no credibility in Respondent's position in regard to this failure and refusal to transfer the NAU employees from Edison to North Brunswick. In addition one must consider the prior history of litigation during which various violations were found by the Board as well as court injunctions and pending contempt proceedings with regard to this unit of employees. The December 16 notice of possible layoff of NAU employees came just prior to a first meeting with the Union pursuant to a court order to bargain almost 2 years after certification of the Union. Moreover, despite the injunctions and contempt proceedings with respect to reinstatement of the unfair labor practice strikers, as noted above, it still failed to transfer any of these unfair labor practice strikers in the NAU portion of the unit to North Brunswick. In discussions with the Union concerning the transfer of Edison NAU employees, Respondent consistently refused to apply any doctrine of seniority and insisted that hiring or employment at North Brunswick would be based mainly on productivity and competence. Yet the records and lists of employees furnished by Respondent and received in evidence here indicated that many of the new employees hired at North Brunswick were dismissed shortly thereafter for lack of competence. It can be concluded that its refusal to employ NAU Edison employees at North Brunswick was part of a

plan on the part of Respondent to keep the new warehouse free of the Union. I find, therefore, that Respondent's failure and refusal to transfer the NAU employees to North Brunswick, resulted from the fact that the NAU warehouse employees were part of the unit which voted overwhelmingly in favor of the Union in the 1987 election. By its conduct in this regard, Respondent violated Section 8(a)(3) and (1) of the Act. See *Joseph Magnin Co.*, 257 NLRB 656 (1981).

*D. The Alleged Refusal to Recognize and Bargain with the Union as to the North Brunswick Warehouse Employees*

At the Edison warehouse, besides the NAU employees, the major group were those employed by Orit. The latter were involved in the receipt and shipping of goods of the P.S. Gitano Division and other Gitano lines of merchandise. As noted previously, when Respondent went public as a corporation, the stock of Orit Corporation was transferred by the Dabah family to Respondent. Despite the public offering, the Dabah's still controlled 85 percent of Respondent's stock. In short Orit remained the operating arm of Respondent with the latter continuing its ownership, management and operation as it did before going public. It is well established that there is "no change of employers," by a mere purchase or transfer of stock from one corporation to another corporation particularly, as in the instant case, where there was absolutely no change in the operation of Orit. See *EPE v. NLRB*, 845 F.2d 483 (4th Cir. 1988). Accordingly Respondent and Orit can be considered as alter egos.

Respondent admittedly has refused to recognize and bargain with the Union at North Brunswick contending that there is no valid accretion to the existing unit at Edison. As to the NAU employees at Edison, it has been found that they were unlawfully laid off and only a few of them were reinstated and transferred to positions at North Brunswick. The operation of NAU at Edison was concluded on January 5, 1989, and continued at North Brunswick having started several weeks prior to that date. As Judge Welles aptly put it in a Board approved decision in *Rice Food Markets*, 255 NLRB 884, 887 (1981), the NAU move to North Brunswick was "more of a spinoff," rather than an addition to an existing operation at Edison. Thus as to NAU there clearly was no accretion, but merely a relocation of a portion of an existing unit involving, at least, indefinite layoff of employees, already found violative of the Act.

With respect to the Orit employees at North Brunswick, it appears that Respondent transferred the work of the P.S. Gitano line from Edison to North Brunswick, and inasmuch as Orit was in a period of expansion, hired new employees to do the P.S. Gitano work at North Brunswick. However the duties of the employees on the P.S. Gitano line in North Brunswick is the same as that performed by the remaining Orit employees at Edison. Indeed some of the supervisors at Edison were transferred to North Brunswick in order to manage the operation there. The work as stated is the same, as are the job classifications, wages, and benefits received by Orit employees. The distance between Edison and North Brunswick is 12 miles. All the work performed at North Brunswick is entered into the same computer located in Edison. Although the Orit employees are managed by a warehouse director at North Brunswick, the overall labor relations policies and management is the same, and are actually per-

formed by Beida, the head of operations for Orit. In these circumstances I find that the Orit employees at North Brunswick also continue as part of the overall unit at Edison. *Rice Food Markets*, supra. On the basis of the same facts found above, I would also find that the employees at North Brunswick of Orit and NAU would also constitute a valid accretion to the existing unit at Edison. See *Universal Security Instruments*, 250 NLRB 661 (1980). According by its refusal to recognize and bargain with the Union as representative of the North Brunswick employees, including Orit and NAU, Respondent violated Section 8(a)(5) and (1) of the Act.

Apart from the accretion issue, Respondent's layoff of the NAU employees at Edison and the continuation of the same operation of NAU at New Brunswick followed by its failure to recall or reinstate these employees, which conduct has already been found to be violative of Section 8(a)(3), additionally violated Section 8(a)(5) of the Act when Respondent refused to recognize and bargain with the Union for the NAU employees at North Brunswick. *Interstate Material Corp.*, 290 NLRB 362 (1988).

*E. The Alleged Violation of Section 8(a)(5) by Respondent's Refusal to Bargain with the Union Regarding the USO Employees*

I have already found that Respondent and USO are a single employer, and, moreover, that USO and Orit employees have a sufficient community of interest to warrant inclusion of the USO employees in the Edison bargaining unit. Respondent has admittedly refused to recognize and bargain with the Union as to the USO employees, and as I have found no merit to its contention that USO and Respondent are completely separate corporations lacking a community of interest, I find further that it additionally violated Section 8(a)(5).

*F. The Alleged Unlawful Refusal to Furnish Information*

The complaint alleges and Respondent admits that on January 5, 1989, the Union made a written request of Respondent to furnish information concerning employees at Edison and North Brunswick. It further alleges that Respondent failed and refused to furnish information regarding employees at North Brunswick. The record reveals that almost immediately Respondent did furnish requested information to the Union, but regarding solely employees at Edison. In addition Respondent in writing also advised the Union that it would not furnish the same information as to the North Brunswick employees, because it did not believe it was obligated to do so. Nevertheless the record does contain documents submitted sometime thereafter providing various types of lists of employees both as to NAU and ORIT at North Brunswick. These lists are basically with reference to the hiring and/or termination of the North Brunswick employees and, perhaps does not completely fulfill the requests made of Respondent concerning North Brunswick.

In view of the finding I have made to the effect that the North Brunswick employees are in the same unit with the Edison employees, I find that the items of information requested by Respondent for North Brunswick are clearly relevant and necessary for the Union's ability to carry out its bargaining duties and responsibilities. See *Dahl Fish Co.*, 279 NLRB 1084, 1101 (1986). Assuming arguendo that I

had found that the North Brunswick employees were not appropriately part of the Edison bargaining unit, the information would still be relevant to the Union's efforts to bargain about transferring the laid-off employees. Accordingly I find that by refusing to timely furnish the information requested by the Union concerning the employees at North Brunswick, Respondent further violated Section 8(a)(5) of the Act. *FMC Corp.*, 290 NLRB 483 (1988).

*G. The Alleged Refusal to Bargain Concerning  
the Effects of the NAU and Gitano Move to  
North Brunswick*

Failure to bargain about the effects of Respondent's decision and actual move of the NAU operation from Edison to North Brunswick had the most obvious effect on NAU employees who were laid off from Edison. The Supreme Court has held that an employer is obliged to bargain "in a meaningful manner and at a meaningful time" concerning the effects on its employees of a decision to close and relocate. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981). The Board has stated "an element of 'meaningful' bargaining is 'timely notice to the Union' of the decision. *Penntech Papers*, 263 NLRB 264, 275 (1982), *enfd.* 706 F.2d 18 (1st Cir. 1983).

In this case the record reveals that some time in early August, Gabay, NAU warehouse manager, held a meeting of the employees and informed them that the operation would be closed down in Edison and moved to North Brunswick. Having learned of this statement, the Union, on August 11, 1988, wrote to Respondent requesting it to negotiate "the impact and effect this move will have on the employees." Respondent made no reply to this request until December 16, 1988, when it advised the Union by letter that it intended to close Edison on or about December 30, 1988. Moreover it stated Respondent's intention to lay off all NAU unit employees at that time and relocate to a larger facility in North Brunswick. Thereafter arrangements were made by counsel to meet on December 29. It should be noted that this meeting was apparently arranged so that Respondent could comply with an order of the Board, enforced by the Court, to bargain with the Union generally concerning the unit employees in the Edison warehouse. In any event the issue here is whether Respondent gave the Union some timely notice of its decision to terminate the NAU operation at Edison and move NAU to North Brunswick. Gabay and Beida who testified for Respondent on this issue gave various types of testimony. First Gabay admits that he spoke to the employees in August. They conceded that Beida told Gabay to solicit bids for construction in September in the space to be allocated to NAU. At another point Gabay said that the final decision was made in November when construction orders were already given. It is clear that construction began early in December, at which time Beida stated that a decision by upper management had been made, claiming that the delay and final decision was due to top officials being occupied with Respondent's going public on the stock market. The only actual notice given was December 16. Taking into account the belatedness of this offer, the time of the year, usually the holiday season, clearly the notice was not adequate. Respondent's lack of good-faith in this regard is further evidenced by the actions that took place later. At a meeting as late as January

5, Respondent indicated that the Edison shutdown of NAU would occur within a few weeks, yet on, the next day January 6, 1989, all but 10 NAU employees were laid off. Accordingly I find that Respondent failed to bargain in good-faith concerning the effects of the decision to close the NAU operation at Edison and relocate it to North Brunswick. Further, by reason of its failure to give timely notice of its decision to the Union, Respondent additionally violated Section 8(a)(5). See *Metropolitan Teletronics Corp.*, 279 NLRB 957 (1986).

As to the move of the P.S. Gitano line from Edison to North Brunswick, Respondent contends that P.S. Gitano is neither a separate corporation nor division of Orit. In any case P.S. Gitano is a line of apparel and its merchandise was received and shipped by Orit employees in Edison. While it appears from the record that no Orit Edison employees lost their positions or were laid off because of the move to North Brunswick, it is also clear that Respondent did hire new employees to work the P.S. Gitano line at North Brunswick, and moreover refused to recognize and bargain with the Union concerning these employees at North Brunswick. Certainly the Union was entitled to notice of Respondent's decision to move unit work from Edison to new space in North Brunswick so that it could be afforded an opportunity to bargain or to request bargaining of the effect of this move on its Edison unit employees. There is no question of the timeliness of a notice by Respondent of its decision, since no notice was ever given to the Union, as far as this record indicates. The December 16, 1988 letter to the Union is only concerned with the NAU operation. Therefore Respondent further violated Section 8(a)(5) by refusing to bargain as to the effects of the P.S. Gitano line being moved to North Brunswick.<sup>4</sup>

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES  
ON COMMERCE

The activities of Respondent set forth in section II, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

<sup>4</sup> Respondent's answer contains an affirmative defense to the effect that allegations regarding USO and also as to Gitano and Orit's North Brunswick facility are barred by Sec. 10(b) of the Act. In its brief Respondent contends that USO's existence in Edison was "well known, and the Union never demanded recognition until 18 months later." The record in fact reveals that insofar as the Union was concerned, it had no knowledge of USO's existence as a separate unit in Edison. To the contrary it appears that Respondent did everything possible during the time of the election campaign and the election itself to shield USO employees from the rest of the unit. In any case I have found that USO and Respondent are single employers and that its employees at Edison are appropriately in the unit certified there. As to Gitano and Orit at North Brunswick, it is conceded that the two corporations are alter egos and since the original charge filed against Respondent was clearly timely, it follows that allegations with respect to the North Brunswick facility are not barred by Sec. 10(b).

## CONCLUSIONS OF LAW

1. Respondent, Gitano Group, Inc. and United States Outerwear constitute a single employer, and are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Automobile, Aerospace and Agricultural and Implement Workers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, Gitano Group, Inc., having obtained the stock of Orit Corporation, Inc., for the purpose of going public, and having continued, with the same ownership and control, the operations of Orit, is an alter ego of Orit.

4. Respondent and North American Underwear (NAU) are single employers.

5. All full-time and regular part-time warehouse employees by Respondent at its Edison and North Brunswick, New Jersey warehouses, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. By laying off NAU employees at Edison and refusing to transfer them to the NAU operation at North Brunswick, because those employees are members of the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

7. By refusing to recognize and bargain with the Union as the exclusive bargaining representative of all employees in the above-described bargaining unit, including the North Brunswick warehouse, Respondent has engaged in and continues to engage in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

8. By refusing to recognize and bargain with the Union as the exclusive bargaining representative of USO employees, Respondent further violated Section 8(a)(5) and (1) of the Act.

9. By failing to notify the Union in a timely manner of its decision to relocate the P.S. Gitano line and the NAU operation to North Brunswick, New Jersey, Respondent failed to bargain in good faith about the effect of that decision on unit employees and thereby violated Section 8(a)(5) and (1) of the Act.

10. By refusing to provide relevant, timely, and adequate information requested by the Union, Respondent further violated Section 8(a)(5) and (1) of the Act.

## THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, 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.

I have found that Respondent unlawfully laid off and refused to transfer the NAU employees to North Brunswick in

violation of Section 8(a)(3) and (1) of the Act by reason of their membership in the Union and other protected activities. Accordingly I recommend that Respondent be ordered to reinstate them to their former positions, or if no longer available, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges; and make them whole for any loss of earnings or other monetary loss they may have suffered as a result of the discrimination against them, less interim earnings, if any. The backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It appears from the record that certain of the laid-off employees have, in the interim, been reinstated and, as to those employees, they should be made whole for any loss of earnings or other monetary loss as described above. Although the record is not clear on this point, the same remedy would apply to Orit employees who may have been laid off as a result of the transfer of the P.S. Gitano line from Edison to North Brunswick.

As I have found that Respondent has failed and refused to recognize and bargain with the Union for those employees located in North Brunswick, I shall recommend that Respondent be ordered to recognize the Union as the representative of the employees in the unit found appropriate herein, which shall include the warehouse employees at both the Edison and North Brunswick warehouses, and bargain concerning both locations.

It is further recommended that Respondent be ordered to recognize and bargain with the Union as the collective-bargaining representative of the USO employees in Edison whom I have found to be part of the warehouse unit in that location.

Having found that the Respondent had violated Section 8(a)(5) of the Act by failing and refusing to bargain concerning the effects of the transfer of the NAU operation to North Brunswick, the usual remedy concerning backpay as a result of the failure to bargain concerning effects is not necessary here. I have already provided a full backpay and reinstatement remedy as a result of the Respondent's violation of Section 8(a)(3) of the Act by the layoff and refusal to transfer NAU employees to North Brunswick.

In order to ensure that the employees will be accorded the statutorily prescribed services of their elected bargaining agent for the period provided by law, I shall recommend that the initial year of certification begin on the date that Respondent commences to bargain in good faith with the Union as the bargaining representative in the appropriate unit. *Southern Paper Box Co.*, 193 NLRB 881, 883 (1971).

[Recommended Order omitted from publication.]