

Coca-Cola Bottling Company of Buffalo, Inc. and Market Produce, Warehouse, Frozen Food, Cannery Workers, Drivers & Helpers, Local Union 588, of the International Brotherhood of Teamsters, AFL-CIO. Case 3-CA-14611

January 23, 1998

THIRD SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

On June 26, 1996, Administrative Law Judge Howard Edelman issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

We adopt the judge's conclusion that under *Gitano*, supra, the presumption that the Respondent's new facility at Orchard Park was a separate appropriate unit has been rebutted. In so doing, we emphasize his finding that the daily work assignments and "load maps" for the Orchard Park employees were faxed each day from Tonawanda; and his finding (despite his statement that there was no interchange between the employees at the two facilities) that one of the three Orchard Park unit employees was required to punch in and out at the Tonawanda facility daily, as he stopped there on his way to and from work at Orchard Park in order to transport products from Tonawanda to Orchard Park. We also emphasize that, as discussed in the initial decision in this proceeding, *Coca-Cola Bottling Co. of Buffalo*, 299 NLRB 989, 992 (1990), the

¹Although the Respondent argues that an analysis of the similarity of work performed at the Orchard Park and the Tonawanda facilities is irrelevant under *Gitano Distribution Center*, 308 NLRB 1172 (1992), we find otherwise and agree with the judge's consideration of this factor. *Mercy Health Services*, 311 NLRB 367 (1993); see also *Deaconess Medical Center*, 314 NLRB 677, 680 (1994).

We correct the judge's inadvertent error at fn. 1 of his decision where he states that the Union "did represent a majority" of the Orchard Park employees; rather, the facts show that the Union did not represent a majority of the Orchard Park employees. This factual error does not affect our decision.

²Chairman Gould notes that, in light of the Second Circuit's decision, *Gitano*, supra, is the controlling law in this case. The narrow issue before the Board on remand from the Second Circuit was whether or not to apply *Gitano* retroactively. In agreeing to apply *Gitano* retroactively, Chairman Gould did not thereby indicate his approval of *Gitano*.

one unit employee who transferred to Orchard Park from Tonawanda retained his seniority.³

Further, we find it unnecessary to rely on the judge's statement that he did not attach significant weight to the distance between the Orchard Park and the Tonawanda facilities "in view of the common use of telephonic and facsimile communication." Rather, we note that although the 21-mile distance between the two facilities could be viewed as a factor that would support the presumption that the Orchard Park facility was a separate appropriate unit, we find that in the circumstances of this case the mileage distance is outweighed by the other factors listed above (as well as the fact that the Orchard Park facility was opened to serve a portion of the territory formerly serviced by Tonawanda) that indicate the sufficient closeness and resulting integration of the two facilities.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Coca-Cola Bottling Company of Buffalo, Inc., Buffalo, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, and shall be required to make whole its employees as provided in *Coca-Cola Bottling Co. of Buffalo*, 313 NLRB 1061 (1994).

³We also note that the above factors distinguish the instant case from *Overnite Transportation Co.*, 306 NLRB 237 (1992), modified at 311 NLRB 1242 (1993), as does the fact that in the instant case all trucks and other equipment used at Orchard Park were serviced at Tonawanda, whereas in *Overnite* each terminal performed general routine maintenance of their respective vehicles (although if a breakdown occurred, the vehicle would be taken to the nearest terminal to be repaired).

SUPPLEMENTAL DECISION

HOWARD EDELMAN, Administrative Law Judge. On April 23, 1996, the National Labor Relations Board issued a Second Supplemental Decision and Order remanding this matter to Administrative Law Judge Howard Edelman, to decide whether the principles of *Gitano Distribution Center*, 308 NLRB 1172 (1992), should now be applied.

On November 4, 1988, the General Counsel of the Board issued a complaint against Coca-Cola, alleging that Coca-Cola had violated Section 8(a)(1) and (5) of the Act.

Judge Edelman held a hearing on the complaint in Buffalo, New York, on February 7 and 8, 1989. On August 16, 1989, Judge Edelman issued his decision, finding that Coca-Cola violated the Act based on the accretion theory.

Coca-Cola filed exceptions to the Board. On September 27, 1990, the Board issued its decision in which it also found that Coca-Cola violated the Act. However, the Board used a different theory of liability, referred to as the "spin-off" theory. *Coca-Cola Bottling Co. of Buffalo*, 299 NLRB 989 (1990) (*Coca-Cola I*). The Second Circuit later affirmed the

Board's theory and finding of liability. *NLRB v. Coca-Cola Bottling Co.*, 936 F.2d 122 (2d Cir. 1991).

Thereafter, a compliance specification was issued and a supplemental hearing was held before another administrative law judge. While the matter was pending before this administrative law judge, the Board issued its decision in *Gitano*, in which it expressly overruled the "spin-off" theory, which was fully articulated for the first time in the Board's 1990 decision. The Board later affirmed the decision of the administrative law judge handling the supplemental compliance hearing.

On May 17, 1995, the Second Circuit issued a decision in which it denied enforcement of the Board's 1994 Order in the compliance phase of this matter. The court remanded the case to the Board, which thereafter issued its Order remanding the matter to Judge Edelman for his reconsideration of the case under the principles of *Gitano*. *NLRB v. Coca-Cola Bottling Co. of Buffalo*, 55 F.3d 74 (2d Cir. 1995).

In response to Judge Edelman's Order dated May 8, 1996, Coca-Cola and the General Counsel have agreed that the facts set forth in the administrative law judge's decision dated August 16, 1989, which were contained in the Board's decision in *Coca-Cola Bottling Co. of Buffalo*, supra, are the stipulated facts for purposes of the application of the principles of *Gitano* to this case.

Analysis and Conclusion

Both counsel for the General Counsel and counsel for the Respondent agree that under *Gitano*, the Board begins with a rebuttable presumption that the unit at the new facility is a separate appropriate unit. See, e.g., *Haag Drug Co.*, 169 NLRB 877 (1968). The presumption may be rebutted by a showing that the facility in question has been so effectively merged into a more comprehensive unit, or is so functionally integrated as to have no separate identity. *Dixie Belle Mills*, 139 NLRB 629, 631 (1962); and *Haag Drug Co.*, supra at 879. If the presumption of appropriateness is not rebutted, the Board will apply a simple fact-based majority test to determine whether the employer is obligated to recognize and bargain with the union at the facility in dispute. If a majority of the employees at the new facility are transferees from the original bargaining unit, the Board will presume that these employees continue to support the union, and will require the employer to bargain. Absent a "majority" showing, the presumption of continuing employee support for the union does not arise, and no bargaining obligation exists. *Gitano*, supra at 1175.

In *Haag Drug Co.*, supra, the Board restated its policy of presuming that single location units are appropriate in retail chain-store operations:

Absent a bargaining history in a more comprehensive unit or functional integration of a sufficient degree to obliterate separate identity, the employees' "fullest freedom" is maximized, we believe, by treating the employees in a single store . . . as normally constituting an appropriate unit for collective bargaining purposes.

However, at the same time, the Board pointed out that the presumption is rebuttable:

[W]here an individual store lacks meaningful identity as a self contained economic unit, or the actual day-to-day supervision is done by solely by central office officials, or where there is substantial employee interchange destructive of homogeneity, these circumstances militate against the appropriateness of a single-store unit. Id. at 879.

In determining whether the presumption has been rebutted in a given case, the Board considers such factors as central control over daily operations and labor relations, including the extent of local autonomy: similarity of skills, functions, and working conditions; degree of employee interchange; distance between locations; and bargaining history, if any. *Red Lobster*, 300 NLRB 908 (1990); *J&L Plate*, 310 NLRB 429 (1993); and *Courier Dispatch Group*, 311 NLRB 728 (1993). Based on the record evidence relating to these factors, I conclude that the presumption of Orchard Park as an appropriate unit is overcome.

In the issue of central control of daily operations and labor relations the administrative law judge and the Board found in *Coca-Cola I*, that the Respondent transferred about 30 percent of its accounts to Orchard Park, the facility in issue, to be serviced from this new facility. The daily work assignments and "load maps" for the Orchard Park crew were faxed from Tonawanda. The administrative law judge in *Coca-Cola I* characterized the functional integration of the two facilities as "almost total," observing that the product was delivered at least twice daily from Tonawanda to Orchard Park by an employee from Orchard Park who punched in and out at Tonawanda; that the customers serviced by Orchard Park had previously been serviced by Tonawanda; that the product came exclusively from Tonawanda for ultimate distribution by Orchard Park; and, that the Orchard Park trucks and equipment were serviced by Tonawanda employees. (Id. at 991.)

The counsel for the Respondent contends the fact that an admitted statutory supervisor was one of the four individuals employed at the Orchard Park facility, is an important factor in determining local autonomy and thus an important fact in demonstrating a separate community as interest. *Executive Resources Associates*, 301 NLRB 400, 402 (1991).

However, I conclude that in the circumstances of this case, including the small size of the unit, the fact that a statutory supervisor was on site at Orchard Park does not, of itself, indicate a high degree of local autonomy in labor relations. The administrative law judge found that such supervisor spent most of his time working with the others, and that he could best be described as a "working supervisor." (*Coca-Cola I* at 991.) More importantly, the judge found that decisions as to hiring, rates of pay, pay raises, benefits and vacation requests were "centralized from the Tonawanda facility" (Id. at 992). I would conclude, at best, such supervisor was a minimal statutory supervisor, with nowhere near the authority of a typical retail store manager or plant manager. At best he minimally supervised three employees.

Further, the facts indicate that the working conditions, skills, and functions of the Orchard Park employees are identical to those performed by the bargaining unit members at the Tonawanda facility. The vast majority of worktime of the Orchard Park employees is spent on loading and stripping trucks. The load maps used by the Orchard Park employees

are identical to those used by the Tonawanda employees and the same trucks are being loaded with the same products. Further, the Orchard Park employees receive substantially the same rates of pay and other benefits. (Id.)

Counsel for the Respondent contends that the 20-mile distance between the Orchard Park facility and the Tonawanda facility is a significant factor in the Board's current view concerning single unit presumption. In this connection counsel for the Respondent points out that the Board has also held that a distance of 10 or 12 miles did not favor integration of two facilities. *Super Valu Stores*, 283 NLRB 134 (1987). The same distance produced the same result in *Bryan Infants Wear Co.*, 235 NLRB 1305 (1978). Counsel for the Respondent points that the initial decision established that the driving time for the 20-mile distance between the two facilities was 30 minutes.

I do not attach significant weight to respondent counsel's contention in view of the common use of telephonic and facsimile communication.

Counsel for the Respondent also contends that there is no significant interchange between the employees at the Tonawanda and Orchard Park facilities and that such lack of interchange is a significant factor in favor of finding a separate community of interest. *Executive Resources*, supra at 401.

Counsel for the General Counsel concedes the lack of interchange.

Since there is no history of the Respondent's employees performing similar work at other "satellite" facilities, the parties' bargaining history provides little guidance here.

I conclude that the only factor in this case which militates in favor of a separate appropriate unit at Orchard Park is the lack of employee interchange between the two facilities. The evidence as to the remaining factors, particularly as to centralized control of daily operations and labor relations, and the lack of a supervisor with the authority of a retail store, or plant manager outweighs the absence of interchange and suffices to rebut the presumption that Orchard Park was a separate unit.¹

Therefore I conclude that *Gitano* does not apply to the facts of this case and that the Respondent violated Section 8(a)(5) of the Act, and that it should be required to make whole its employees as provided in *Coca-Cola Bottling Co. of Buffalo*, 313 NLRB 1061 (1994) (*Coca-Cola II*).

¹ It is admitted by counsel for the General Counsel, and supported by the facts of the original case, *Coca-Cola I*, that the Union did represent a majority of the three employees employed at the Orchard Park plant facility.