

**Morris and David Yoseph, d/b/a M. Yoseph Bag Company<sup>1</sup> and District 65, Retail, Wholesale and Department Store Union, AFL-CIO.<sup>2</sup> Case No. 4-CA-1593. November 26, 1962**

### SUPPLEMENTAL DECISION AND ORDER

On July 21, 1960, the Board issued its Decision and Order in the above-entitled case<sup>3</sup> in which it was found, *inter alia*, that District 65 represented a majority of the employees in Yoseph's plant; that rather than bargain with District 65, the Respondent gave the employees a choice between rejecting District 65 in favor of a "Philadelphia union" in which case the operation would continue, or remaining with District 65 in which event the plant would be shut down, the employees discharged, and the business sold; that immediately upon being informed that the employees elected to remain with District 65, Yoseph did in fact decide to close the plant and discharge the employees, and ultimately did close the plant and sell the business to Girard Bag Company<sup>4</sup> of nearby Philadelphia in consideration for a one-third interest (evaluated at \$46,000) in Girard Inc. The foregoing conduct was found to constitute violations of Section 8(a)(1), (3), and (5) of the Act.

Thereafter, the Board petitioned the United States Court of Appeals for the Third Circuit for enforcement of its Order, and District 65 petitioned that court for review and modification of the Board's Order.

On September 18, 1961, the court rendered its decision in this matter,<sup>5</sup> and remanded the case, without prejudice to the parties, specifically directing the Board to determine: (1) on or about what date the decision was made that Yoseph completely and permanently should go out of business; (2) the date on which Yoseph did, in fact, go out of business; and (3) what importance, if any, the Board attaches to the fact that the business of Yoseph was taken over by Girard Bag Company, a corporation of which David Yoseph is a director, officer, and substantial stockholder.

<sup>1</sup> Hereinafter referred to as Yoseph, or Respondent.

<sup>2</sup> Hereinafter referred to as District 65.

<sup>3</sup> 128 NLRB 211

<sup>4</sup> Girard Bag Company (herein called Girard-Partnership) was a Pennsylvania partnership consisting of Maurice Wolf and Harry Gillick engaged partly in the same function as the Respondent and partly in "brokerage" of burlap bags on a nationwide scale. An element in the transfer of Yoseph's assets and business to Girard was the dissolution of Girard-Partnership and the formation of Girard Bag Company, Incorporated (herein called Girard Inc.), a Pennsylvania corporation consisting of Wolf, Gillick, and David Yoseph, each of whom owned one-third of the stock in Girard Inc., and each of whom apparently exercised equal control over the business. Where it is unclear whether reference should be to Girard-Partnership, Girard Inc., or both, the simple title Girard will be used.

<sup>5</sup> 294 F. 2d 364 (C.A. 3).

Thereafter, on December 8, 1961, the Executive Secretary, by direction of the Board, reopened the record and remanded the proceeding to the Regional Director for a further hearing before a Trial Examiner.

On March 26, 1962, Trial Examiner Arthur E. Reyman issued his Supplemental Intermediate Report in the above-entitled proceeding making certain findings concerning the three questions posed by the court, and recommending a remedy at variance with the Board original disposition of the case as set forth in the attached Intermediate Report. Thereafter the Respondent filed exceptions to the Intermediate Report and a brief in support thereof.

The Board has reviewed the rulings of the Trial Examiner made at the supplemental hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Supplemental Intermediate Report, the exceptions and brief and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner insofar as they are consistent with the Supplemental Decision herein.

The facts as clarified at the supplemental hearing are, briefly, as follows: District 65 first demanded recognition on July 11, 1957, asserting a majority status which was never questioned. Yoseph (at the original hearing) and Wolf (at the supplemental hearing) claimed that an oral agreement was reached on July 15 for Respondent to sell its business to Girard. Wolf also testified that on that date he instructed his attorney to contact Yoseph's attorney in order to organize Girard Inc. The choice of rejecting District 65 or having the plant closed and the business sold, was offered by Yoseph to his employees on July 19. On July 19 the employees chose to remain in District 65, and immediately upon being so informed Yoseph in fact shut down the plant and ceased processing bags on that date.

Wolf testified that approximately 2 weeks after the alleged July 15 agreement, the principals and attorneys met and discussed details of the transfer of Yoseph's assets and the formation of Girard Inc. The certification of incorporation for Girard Inc. was filed in Pennsylvania on August 15, and the assets of Yoseph were sold to Girard Inc. by bill of sale in New Jersey on August 17. The latter document is the only written evidence of the sale of Respondent's assets or of the dissolution of the Yoseph partnership.

1. On the basis of the foregoing facts, the Trial Examiner found that Yoseph's decision to go out of business completely and permanently was made on the day approximately 2 weeks after the alleged July 15 tentative oral agreement between Yoseph and the Girard partners, when the interested parties and their attorneys met and worked out the details of the transaction by which Yoseph's assets were trans-

ferred to Girard, and Girard Inc. was organized.<sup>6</sup> We agree with his findings and conclusion in this regard.

In the Board's original Decision and Order it was found that the decision was reached by Yoseph ". . . on July 19 (if indeed then) . . ." <sup>7</sup> It is clear on the record that Yoseph did not cease functioning entirely upon discharging his employees on July 19 (which fact, together with the date of the bill of sale, persuaded the Board to append the parenthetical "if indeed then" to its finding).<sup>8</sup> The supplemental hearing also makes obvious, as pointed out by the Trial Examiner, the fact that the details, indeed the very heart of the agreement by which Yoseph would cease functioning and enter into a new enterprise with Wolf and Gillick, were not established until the meeting some 2 weeks later. Before that meeting, which was not alluded to at the original hearing, Yoseph could not know with any degree of precision just what cost would result from the decision to go out of business completely and permanently, what benefits would be derived therefrom, and what responsibilities, liabilities, and emoluments would be forthcoming from such a change. We agree with our dissenting colleague that the closing down of a business cannot be accomplished in a single moment or by a single act. Indeed, our findings herein are that the shutdown by Respondent required over 2 weeks after the decision was made. But our dissenting Member would have us impute an instantaneous decision to take that step at the very moment an intention to do so was announced, without allowing for any resolution by the Respondent of the consideration which would be forthcoming for the tangible assets and good will of the business thus being relinquished,<sup>9</sup> and would have us find that the Respondent's

<sup>6</sup> The Trial Examiner sets that date as on or about July 30, 1957, a wholly reasonable presumption which in any event does not prejudice the Respondent.

<sup>7</sup> 128 NLRB 211 at p. 217.

<sup>8</sup> Thus, Yoseph, who was engaged in the reconditioning and sale of used feed bags, continued at least to pick up used bags (the raw material of its operation) after July 19. It was thereby performing a basic portion of its normal functions. The continuing accumulation of raw materials, i.e., used bags, is entirely inconsistent with a liquidation or any fixed intention not to resume operations under any circumstances. It is interesting to note, in this connection, that on July 15 Yoseph told one of his drivers, Randolph Allen, "I know that you joined that union, but with or without the union would you still continue buying bags for me? I am going to close the plant down and if I can have the two drivers . . . I would have the union licked."

<sup>9</sup> It is asserted in the dissent that ". . . other avenues of disposing of the business remained open to the Respondent, any one of which would have been consistent with its prior decision to cease functioning as a business entity." However, the record is barren of any suggestion as to what those avenues were or that any steps had been taken to explore them. In the absence of such evidence, it is clear that other avenues were also open to Respondent which were equally consistent with an uncertain state of mind and are inconsistent with a decision to close permanently. For example, it is obvious that until the bill of sale was executed Yoseph could have resumed operations if at any time he concluded that District 65 was a ghost of the past, or he could have reduced his operation (as indeed he did for about 1 month following July 19) and permanently limit the business to the pickup and delivery of bags. Yoseph's statement of July 15 to driver Randolph Allen, quoted in footnote 8, above, merits noting in connection with this discussion of the possibilities.

commercial life ceased at the very moment that such intention was expressed.

It is unrealistic to think that a final decision of this nature would be made before all facets of the transaction were clear. Accordingly, we agree with the Trial Examiner's conclusion that the decision was made on or about July 30, 1957, when the above-mentioned meeting took place.

2. The Trial Examiner also found that Yoseph did, in fact, go out of business on August 15, 1957, the day the corporate certification for Girard Inc. was filed. We do not agree.

The filing of the corporate certification on August 15 might well, in the absence of other evidence, serve as the birth date for Girard Inc. But we see no persuasive reason to adopt it as the date of the demise of the Yoseph partnership, in view of what we conceive to be far more probative evidence, i.e., the date of the bill of sale by which Yoseph's assets were sold to Girard Inc. We do not agree with the Trial Examiner that the filing of the corporate certification conclusively shows either that the Respondent became defunct as of that date, or that such filing automatically terminated the existence of Yoseph. It is obvious that Respondent could, and in our view did, remain in business as part of the same economic community with Girard Inc. until some action was taken terminating the partnership between David and Morris Yoseph which was in fact Yoseph Bag Company.<sup>10</sup> That action was taken on August 17, 1957, when the assets of Yoseph Bag Company were sold by the aforementioned bill of sale, whereupon Respondent was no longer capable of carrying on the functions for which it was designed. Such a conclusion is not only well supported by the facts of this case, but also is compatible with basic principles of the law of partnership.<sup>11</sup> Therefore, we find that Yoseph did, in fact, go out of business on August 17, 1957.

3. The Trial Examiner concluded, in answer to the third question posed by the court, that the transaction by which Girard Inc. took over the business of the Respondent was such as to require a finding

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<sup>10</sup> We agree with our dissenting colleague that there is a distinction between the date of a business entity's legal demise and the date its commercial life ends. We point out that there is a further distinction between a decision to end the commercial life and the actual termination thereof. Contrary to the implication of the dissenting opinion, the cessation of commercial life occurs when the business ceases to perform any of its functions, not when it *begins* to wind up its operations. Here, we find that the Respondent partially ceased operating on July 19, when it discharged the employees. It ceased its commercial life when it stopped picking up bags, which activity continued for about 1 month after July 19. It ceased to exist for commercial purposes on August 17, when the bill of sale was signed. And it was at about this time that it ceased purchasing used bags and thus ended its commercial life. Thus the cessation of existence and of commercial life occurred here at about the same time. But Respondent's legal life continued thereafter under New Jersey law for the purposes of assessing rights, duties, and obligations incurred during the period preceding August 17 when it was still operating. Contrary to the statement of our dissenting colleague, we have not, in this case, predicated any findings on the statutory continuance of its legal life and have looked only to the commercial aspect of the Respondent.

<sup>11</sup> See 68 CJS Partnership § 344-346.

that Yoseph's motivation and actions were violative of the Act, and that the relationship between Girard-Partnership, David Yoseph, and Yoseph Bag Company, while close and intimate, was not such as to permit a finding that Girard Inc. was the *alter ego* of Respondent.<sup>12</sup> With these findings we agree. However, he further found that a conclusive presumption arises that Girard-Partnership had knowledge of Yoseph's intent to evade bargaining with District 65 and to evade any liability which may have accrued by reason of the violations committed on July 19. He therefore concluded<sup>13</sup> that Girard Inc. ". . . *should* be required to accept responsibility for the reemployment of the discriminatees." [Emphasis supplied.] We do not agree.

The question before us is whether or not Girard Inc. may also be found to be liable for Yoseph's violations. We think not. We can perceive no basis for the Trial Examiner's finding that a conclusive presumption arises that Girard-Partnership had knowledge of Yoseph's intent to violate the Act. Yoseph was never a partner, officer, or agent of Girard-Partnership, and only achieved a status whereby his knowledge would be imputable to Wolf and Gillick when Girard Inc. was formed, almost 1 month after the shutdown of the plant and discharge of the employees. Thus, there is no apparent legal theory upon which to establish such a presumption. Rejecting the "conclusive presumption," the record is devoid of evidence to show knowledge by Wolf and Gillick of Yoseph's intent to evade liability by the transaction which resulted in Girard Inc. taking over the assets and business of the Respondent. As there is no basis for concluding that Girard Inc. was other than a good-faith purchaser dealing at arms' length, we do not believe that the facts of this case would warrant assessing such a liability against Girard Inc. in the absence of such a showing of knowledge.<sup>14</sup> Accordingly, we find that while the transfer and relationship in question are significant as a part of the process by which the Respondent violated the Act, they are, in our opinion, not controlling insofar as the remedy is concerned.

## ORDER

The Board does not adopt the "Recommended Order" of the Trial Examiner. Rather, we hereby reaffirm the Order<sup>15</sup> contained in our

<sup>12</sup> No exception was taken to this finding.

<sup>13</sup> The Trial Examiner phrased this in the form of a suggestion rather than that of a recommendation, and it should be noted that such a provision is not included in the "Remedy" section of his Intermediate Report. Thus, in substance, we are not reversing the Trial Examiner but merely rejecting his suggestion.

<sup>14</sup> *N.L.R.B. v. Birdsall-Stockdale Motor Company*, 208 F. 2d 234 (C.A. 10); *Symms Grocer Co., et al.*, 109 NLRB 346.

<sup>15</sup> As we construe the remand as going only to the question of Girard Inc.'s potential liability, we do not reach the question of the expanded backpay remedy recommended by the Trial Examiner as not being within the scope of the remand. Therefore we reaffirm the Board's original Order in this respect. Member Fanning adheres to the broader remedy set forth in his partial dissenting opinion to the Board's original Order.

original Decision and Order<sup>16</sup> with the following modification to conform that Order to the facts as found herein. Paragraph 2(b) shall be amended to read:

(b) Make whole those individuals found discriminated against for any loss they may have suffered by reason of the discrimination against them from the date of their discharge (July 19, 1957) until the date on which the Respondent, in fact, went out of business (August 17, 1957).

MEMBER RODGERS, dissenting:

The Third Circuit Court of Appeals remanded this case to the Board for the purpose of ascertaining the answers to three specific questions.<sup>17</sup> Accordingly, the hearing was reopened and a Supplemental Intermediate Report was issued. The matter is once again before the Board for decision.

My colleagues in this opinion have determined that (1) the Respondent determined to go out of business on or about July 30, 1957, and (2) the Respondent did not in fact go out of business until August 17, 1957. I disagree with both determinations.<sup>18</sup>

As to my colleagues' first conclusion, it is clear from the record that the Respondent announced its intention to close down and did in fact close down on July 19, 1957. Whatever limited activity may have occurred following that date can reasonably be construed as nothing more than a cleanup operation necessary to the orderly liquidation of the business. Certainly it cannot be said that Respondent's normal business operations continued after that date, nor is there any evidence, verbal or otherwise, indicating any intention to resume operations. The closing down of a business cannot be accomplished in a single moment or by a single act. Nothing short of a sudden and complete abandonment of a property could satisfy so harsh a standard as my colleagues are imposing.

Moreover, I do not deem relevant, much less controlling, the date on which the agreement to sell the business was consummated. This date may well be significant in establishing whether there was or was not an agreement to sell. But it is not, in my opinion, relevant to the Respondent's state of mind on July 19, 1957, when it announced its intention to and did in fact close down the plant. Nor is there

<sup>16</sup> 128 NLRB at 219-221.

<sup>17</sup> The court remanded the case for the Board: (1) to determine the date the decision was made that the Company "completely and permanently should go out of business"; (2) to determine the date on which the Company did, in fact, go out of business, (3) to indicate what importance, if any, the Board attaches to the fact that the business of the Company was taken over by Girard Bag Company, a corporation of which David Yoseph is a director, officer, and substantial stockholder.

<sup>18</sup> I agree with the majority's finding with respect to the third question posed, that no liability should attach to Girard Inc

any evidence that the Respondent vacillated between selling the business and reopening it. The transaction under discussion was not conditional; if it collapsed, other avenues of disposing of the business remained open to the Respondent, any one of which would have been consistent with its prior decision to cease functioning as a business entity. In short, I believe the agreement in question did determine the final disposition of the closed-down business, but it is over-reaching to say that the decision to close down, already made and acted on, did not come into being until the terms of an agreement to sell were agreed upon.

Now as to their second conclusion, it seems to me that my colleagues have set forth not the date when the Respondent went out of business, but have set forth the date upon which the Respondent Company was declared legally dead. There is a difference.<sup>19</sup> It is true, as the majority points out, that as of that date (August 17, 1957), the Respondent "was no longer capable of carrying on the functions for which it was designed." Indeed, it could not, for it had ceased to exist. But, in my opinion, the court did not ask us to determine the date of the legal demise of the Respondent; it asked us, I believe, to determine the date the Respondent did in fact "go out of business," in the everyday sense of that term.

Since, as I have previously indicated, whatever activity took place at and around the Respondent's property after July 19, 1957, could well and reasonably be construed as activity essential to the orderly liquidation of its affairs, and since the Respondent did not perform "the functions for which it was designed" after that date, I would find that the Respondent effectively went out of business on July 19, 1957, and has been out of business continually since that date.

Based on the foregoing, I would reaffirm my holding in the original decision in this case.<sup>20</sup>

<sup>19</sup> The laws in a number of States (for example, South Carolina) extend the legal life of a business entity for a period of time after it has gone out of business, i.e., after its commercial life has ended. See *Darlington Manufacturing Company, et al.*, 139 NLRB 241, footnotes 19, 21. To apply this test would, in my opinion, result in finding that an entity continued in business until it was legally dead, whereas in fact it may well have been out of business in the commercial sense for a year or more.

<sup>20</sup> For a more detailed discussion of this aspect of the problem, see my dissent in *Darlington Manufacturing Company, et al.*, *supra*.

#### SUPPLEMENTAL INTERMEDIATE REPORT

On July 21, 1960, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding, 128 NLRB 21 (Chairman Leedom and Member Bean in agreement, Members Jenkins and Fanning concurring in part and dissenting in part, Member Rodgers dissenting). Thereafter, the Board sought enforcement of its Order and the parties filed petitions for review. On September 18, 1961, the United States Court of Appeals for the Third Circuit remanded the case to the Board with directions to clarify its findings. The court specifically directed the Board to: (1) determine on or about what date the decision was made that the Respondent Company completely and permanently should go out of business; (2) determine the date on which the Respondent Company did, in fact, go out of business; and (3) investigate the nature of the transaction by which Girard Bag

Company took over the business of the Respondent Company and the relationship between Girard Bag Company, David Yoseph, and M. Yoseph Bag Co. On December 8, 1961, the Board caused an Order to be entered herein opening the record and ordering that a further hearing be held before a Trial Examiner for the purpose of adducing additional evidence on the issues enumerated by the court, as set forth above, further ordering that the proceeding be remanded to the Regional Director for the Fourth Region for the purpose of arranging such further hearing and to issue notice thereof, and further ordering that upon the conclusion of the supplemental hearing, the Trial Examiner prepare and serve upon the parties a Supplemental Intermediate Report containing findings of fact upon the evidence received pursuant to the provisions of the Order, and conclusions of law, and recommendations.

Pursuant to notice of supplemental hearing and order rescheduling supplemental hearing, the matter came on to be heard before the Trial Examiner Arthur E. Reyman at Philadelphia, Pennsylvania, on February 13, 1962. At the hearing, each party was represented by counsel and was afforded full opportunity to offer and produce additional evidence on the issues enumerated by the court, as set forth above.

Upon the entire record, including the testimony of witnesses who testified at the supplemental hearing, and from my observation of the witnesses, I make the following:

#### I. FINDINGS OF FACT

Maurice H. Wolf, a witness called by the Respondent Company, is secretary-treasurer of Girard Bag Company, Incorporated. He, Harry Gillick, and David Yoseph are the only stockholders and each holds an equal number of shares of the stock comprising the total shares of the corporation.

A certificate of incorporation of Girard Bag Company, Incorporated, was filed pursuant to the laws of the Commonwealth of Pennsylvania on August 15, 1957. A bill of sale covering the transfer of assets from M. Yoseph Bag Co., a partnership, to Girard Bag Company, Incorporated, was executed and impliedly delivered on August 17, 1957. According to Wolf, two of the three stockholders of the corporation constitute a quorum for the taking of any action other than routine concerning the business of the corporation.<sup>1</sup> Prior to the formation of the corporation, Wolf and Harry Gillick traded as a partnership under the name of Girard Bag Company and had been so engaged in business for approximately 11 years. It was the policy of this partnership not only to process bags but, quoting Wolf, "to go out in the field to smaller dealers, or any type of a dealer that handles bags, and buy up his merchandise and resell it in carload or trailer load lots through the country and out of the country."

Wolf testified that on Monday night, July 15, 1957, he met with David Yoseph at the latter's home and on that evening a verbal agreement was made that he, Gillick, and Yoseph would form a corporation which would take over the business of M. Yoseph Bag Company; that he instructed his attorney to consult with the attorney for Mr. Yoseph and proceed to draw the documents necessary to form a corporation; that approximately 2 weeks later, the principals met with their attorneys and discussed details necessary to be decided concerning the transfer of assets of Yoseph to a corporation and the formation of a corporation.

David Yoseph, a witness called by the Charging Party, testified that he did not recall that he at any time before August 15 discussed the Union and its demands with either Wolf or Gillick, although both before and after July 11, when he first met with the union representatives, he was concerned about the economic aspects of his business because he was spending less money for merchandise and it was costing him more to process the bags; that after the Union presented itself to him,

<sup>1</sup>The Board has found, and the court has agreed, that the July 15 date is not significant in respect to the first time a decision was made to go out of business but that M. Yoseph Bag Co. was in fact in business at least until July 19. Further reviewing the findings of the Board, it is clear that Yoseph was in business on July 19, he on the morning of that day having spoken to his assembled employees and in the afternoon having, as the Board found and the court agreed, refused to bargain collectively in good faith upon the offer of Romadell Jones, the union representative, to enter into negotiations looking forward to agreement on wage rates. Obviously, then, Yoseph had not made up his mind definitely to terminate the business of the Yoseph partnership as of late afternoon on July 19. Accepting the fact of this meeting as related by Wolf and his testimony that he and his partner and Yoseph had instructed their attorneys to prepare or start the preparation of necessary corporate papers, that in itself does not show a final determination by Yoseph to transfer the assets of his partnership to a corporation. There was no meeting of the minds at this point.

it created a factor in his consideration as to whether or not he would act on the suggestion of Wolf to form a corporation.

According to David Yoseph, the dissolution of the partnership of M. Yoseph Bag Company was accomplished on August 15, or on August 17, the date of the bill of sale of the assets of that partnership to the corporation.

Vernal Soltau and Walter Romadell Jones, witnesses called by the General Counsel, each testified that during the week of July 22 and thereafter for approximately 1 month he observed trucks going out in the morning from the Yoseph plant and returning and being unloaded from 4:30 to 5 p.m. in the afternoon. Both witnesses said that they did not observe the processing of bags during this period. Soltau testified that his observations of activity at the Yoseph establishment were for 5 days a week for this approximate month. Jones, for at least 1 week and from time to time thereafter during that month said that he noticed trucks going out in the morning and coming back at night and when they came back they would be loaded; that occasionally he would follow a truck and could see bags being picked up from customers (farmers), leave one customer and go to another, and return to the bag plant for unloading in the evening.

Upon the transfer of the assets of the Yoseph partnership to the corporation, the customer list of the partnership was transferred as goodwill to the corporation.<sup>2</sup>

After the transfer of his duties from Yoseph Bag to Girard Bag Company, Incorporated, David Yoseph performed more or less the same functions as he performed as a partner of the former business. He and the other owners were engaged in buying bags, the processing of bags, overseeing plant operations, and the moving of merchandise through sales. He estimated that about one-third of the accounts of customers of the partnership became accounts of the corporation, that customers he had serviced previously he continued to service for the corporation if he was there when transactions were made, just as he serviced other customers of the corporation. I think it fair to say that, the business of the corporation being of the same nature as the business of the dissolved partnership, his duties and responsibilities as an employee and as an officer or director of the corporation were substantially the same as his duties had been as a member of the partnership. Certainly Yoseph did not have the final authority or full authority with respect to the making of decisions for the corporation, in view of the testimony of Wolf, impliedly supported by that of Yoseph, that the three stockholders of the corporation had equal duties and responsibilities and insofar as definitive or affirmative action by the corporation is concerned, two of the three partners have the final say or, putting it the other way, no one stockholder has as a matter of right the authority to control the actions or business activities of the corporation other than performing the customary, usual and routine duties associated with the running of the business from day to day.

#### Concluding Findings

1. I find that the Respondent Company's decision to completely and permanently go out of business was on the day approximately 2 weeks after July 15, when the oral agreement was made to form a corporation. This would be the time when the interested parties and their attorneys met for the purpose of working out the details of the transfer of the assets of M. Yoseph Bag Company, the partnership, to a new corporation, and their then agreement as to detail imparted to their attorneys. The precise date could not be fixed by Wolf so I therefore find that the date of the decision was on or about July 30, 1957. In so finding, I have considered the Board's finding that Yoseph's decision to close the plant was not announced until he was informed of the employees' choice to continue being represented by District 65, and that the Respondent's alleged economic justification for its conduct constituted a pretext to obscure its real motivation, which was to evade dealing with the Union. The continuing activity at the bag plant, at least during the week of July 22 and thereafter, is indicative of one or both of two probabilities: (1) that Yoseph intended to close his plant and go out of business, or (2) to negotiate further with Wolf and Gillick and if no satisfactory agreement could be made with them, then to close his plant. The circumstances of the case do not permit a finding that Yoseph immediately decided to completely and permanently go out of busi-

<sup>2</sup> Although a stipulation between counsel says that the transfer of goodwill was not covered by the transfer of assets of Yoseph to the corporation, the testimony of David Yoseph that the list of Yoseph's accounts constituted goodwill is more acceptable to me, when it is considered that both Yoseph and Wolf said in effect that the union situation had no bearing on the decision to sell or the actual termination of the partnership.

ness at the very time he laid off or discriminatorily discharged his employees on July 19.

2. I find that the Respondent, M. Yoseph Bag Company, did, in fact, go out of business on August 15, 1957, the day the corporate certificate for Girard Bag Company, Incorporated, was filed. The Respondent was engaged in some kind of activity during and following the negotiations between Yoseph, Wolf, and Gillick. However, on August 15, the Respondent became finally defunct as a business, as is conclusively shown by the filing of the corporate certificate. The Girard Bag Company, Incorporated, was not a *de facto* corporation actively engaged in business in the interim between about July 30 and August 15 is evidenced by the fact that the transfer of assets from the partnership to the corporation was not effectuated until the execution and implied delivery of the bill of sale on August 17, 1957.

3. I find that the nature of the transaction by which Girard Bag Company took over the business of the Respondent Company, in the circumstances, could not have been based on an absolute right of the Respondent to go out of business for any reason. On the contrary, the whole of the circumstances, including the engaging in by the Respondent of unfair labor practices on and prior to July 19, clearly show the nature of the transaction to be such as to require a finding that the motivation for the disposition of Yoseph assets by the Respondent was to defeat and evade the efforts of his employees to bargain collectively through a representative of their own choosing; and further, the professed ignorance of Wolf and Gillick regarding the organizational activities of the Union and the concerted activities of the employees of Yoseph is no excuse for the attempted evasion of such liability as may have accrued against Yoseph by reason of the Respondent Company's unlawful activities. The nature of the transaction on its face shows apparent legality of action; factually, the nature of the transaction was evasive insofar as the rights of employees under Section 7 of the Act were concerned. I find further that the relationship between Girard Bag Company, David Yoseph, and M. Yoseph Bag Company because of the nature of the transaction, was intimate and close and on the whole record a conclusive presumption arises that Girard Bag Company (the partnership of Wolf and Gillick) had knowledge of the intent of Yoseph to, among other things, evade bona fide collective bargaining with the Union and any liability which might have accrued against him by reason of the discriminatory layoffs or discharges of July 19.<sup>3</sup> Therefore, I further find that Girard Bag Company, Incorporated, by taking over the business of M. Yoseph Bag Company, and by continuing the business of Girard Bag Company, a partnership, is and has been engaged in commerce within the meaning of the Act.<sup>4</sup>

## II. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

Those activities of the Respondent Company set forth in section I, above, occurring in connection with the operations of the Company as set forth in the Decision and Order of the Board issued July 21, 1960, have a close, intimate, and substantial relation 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.

## III. THE REMEDY

Having found that the Respondent Company has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom and take certain affirmative action which it is found, is necessary to effectuate the

<sup>3</sup> I do not overlook the argument of counsel for the Respondent that Yoseph Bag Company was engaged in the business of bag brokerage, as distinguished from the reconditioning and the sale of bags. He says that "Mr. Yoseph's amalgamation into this organization simply gave them an inside man, one who could control the production and the processing of bags, while they themselves could devote themselves to the operation of selling on a wider scale." However, this argument is directed to the nature of the business of the corporation, and not to the nature of the transaction.

<sup>4</sup> Certainly, Girard Bag Company, Incorporated, cannot be found to be the *alter ego* of the Respondent. There existed, though, through the relationship between Girard Bag Company and M. Yoseph Bag Company, a situation where properly the corporation should be required to accept responsibility for the reemployment of the discriminatees. Cf. *N L R B v. Aluminum Tubular Corp. et al.*, 299 F. 2d 575 (affirming in part 130 NLRB 1306), and cases cited

policies of the Act and to restore insofar as possible the *status quo* existing prior to the commission of the unfair labor practices.

It shall further be recommended that the Respondent Company be ordered to make whole each employee discriminatorily laid off or discharged on July 19, 1957, for any loss of pay he may have suffered by reason of the Respondent's discrimination, by payment to him of a sum of money equal to the amount he would normally have earned from the date he was terminated until the date he has obtained substantially equivalent employment with another employer or, in the event such substantially equivalent employment has not or cannot be obtained, until the date of an offer of employment made to him by the Girard Bag Company, Incorporated, less his net earnings during such period, to be computed on a quarterly basis in the manner established in *F. W. Woolworth Co.*, 90 NLRB 289; and each such employee shall also be reimbursed for any expenses justifiably incurred in the seeking of employment.<sup>5</sup>

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

#### CONCLUSIONS OF LAW

1. Morris Yoseph<sup>6</sup> and David Yoseph doing business as M. Yoseph Bag Company (Respondent) at the times material herein, was engaged in commerce within the meaning of the Act.

2. Girard Bag Company, Incorporated, is a Pennsylvania corporation and is and has been since August 15, 1957, engaged in commerce within the meaning of the Act.

3. District 65, Retail, Wholesale and Department Store Union, AFL-CIO, is a labor organization within the meaning of the Act.

4. On July 11, 1957, and at all times since, the Union aforesaid has been the exclusive representative of all the employees in an appropriate unit of the Respondent's employees for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

The unit of the Respondent's employees appropriate for collective bargaining is and has been:

All production and maintenance employees, including truckdrivers, of the Respondent excluding office clerical employees, guards, and supervisors as defined in the Act.

5. By discriminating in regard to the hire and tenure of employment of employees by closing its plant and discharging its employees on July 19, 1957, the Respondent has discouraged membership in a labor organization and by such discrimination and by interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, as hereinabove found, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act and Section 8(a)(1) thereof.

6. By refusing, on and after July 19, 1957, to bargain collectively with the aforesaid Union as the exclusive representative of the employees, in the aforesaid appropriate unit, the Respondent has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(a)(5) of the Act.

7. By interrogating the employees, threatening to deprive them of overtime and in fact doing so, threatening individual employees that the plant would be closed, and threatening assembled employees, on July 19, 1957, that the plant would be closed if they did not renounce their chosen representative, the Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

[Recommendations omitted from publication.]

<sup>5</sup> As the record reflects, the activities of the Yoseph partnership as such long since ended. The Charging Party has suggested that because the Respondent has been found to have engaged in unfair labor practices before its dissolution, the Board may properly order it to resume business at its Bridgeton plant and offer reinstatement to the discriminatees at that location. In the absence of compelling authority, aside from feasibility, I do not believe that the Act empowers the Board to make such an order.

<sup>6</sup> Morris Yoseph died on October 5, 1958, during the pendency of litigation herein, prior to the issuance of the Decision and Order of the Board on July 21, 1960.