

**Radiant Fashions, Inc. and Local 482 of the International Ladies' Garment Workers' Union, AFL-CIO. Case 31-CA-2681**

April 6, 1973

**DECISION AND ORDER**

BY CHAIRMAN MILLER AND MEMBERS JENKINS  
AND KENNEDY

On December 11, 1972, Administrative Law Judge David E. Davis issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Respondent has excepted, *inter alia*, to the Administrative Law Judge's finding that it is a successor-employer to Charmfit of Hollywood, Inc. (hereinafter "Charmfit"), and therefore obligated to bargain with the Union as exclusive representative of its employees. In our view, Respondent's exception to the finding of successorship is meritorious. Accordingly, we further find that its refusal to bargain with the Union was not violative of Section 8(a)(5) and (1) of the Act.

For approximately 10 years prior to October 23, 1967, Charmfit had been engaged in the manufacture of brassieres and related items under the presidency and 50 percent stock ownership of Harry W. Froehlich. On that date, Charmfit merged with Russ Togs, Inc. (hereinafter "Russ"), and Froehlich executed a 5-year employment agreement pursuant to which he would remain as director and president of Charmfit. For approximately 4 years thereafter, Froehlich operated Charmfit as a wholly owned subsidiary of Russ engaged in the design, manufacture, and sale of brassieres under the Charmfit and Charmfit by Youthcraft labels. Following the merger, Charmfit continued to occupy the same premises in Los Angeles which it had occupied prior thereto.

In April 1969, Froehlich, at the direction of Russ management in New York, executed a collective-bargaining agreement with the Union encompassing all of Charmfit's production and maintenance employees. These employees promptly became and

remained dues-paying members of the Union in accordance with the union-security and dues check-off provisions contained in the agreement.<sup>1</sup>

Two years later, in April 1971, prior to the expiration of both the collective-bargaining agreement with the Union and Froehlich's employment agreement with Russ, Froehlich received instructions from Russ management to begin a gradual phasing out of production in Los Angeles with a view towards total cessation of operations by November 30, 1971. Russ planned to continue the Charmfit business, and the nationwide marketing of Charmfit products, but with production limited to facilities located in Brooklyn, New York, and Puerto Rico.

During the period between April and late June 1971, Froehlich and representatives from the Union met several times in order to discuss the most efficient manner of effectuating the impending layoffs. By July 1, 1971, their efforts had resulted in a complete cessation of all production, the termination of all employees, and the award of severance pay to each employee in accordance with the terms of the collective-bargaining agreement. Thereafter, the Los Angeles facility remained open for the sole purpose of transferring business records to Brooklyn and attending to other lingering administrative matters.

While the Los Angeles operation was in the process of being phased out, Froehlich and Russ commenced negotiations in early June regarding a settlement of his employment agreement which then had approximately 1 1/2 years to run. Up to and including the time of the cessation of operations in late June, these negotiations focused exclusively upon the amount of money which Froehlich would receive as a settlement. However, in mid-July, approximately 2 weeks after the Los Angeles plant had completely shut down, Russ notified Froehlich for the first time that a condition precedent to his release from the employment agreement would be Froehlich's purchase of the Los Angeles facility and assumption of a lease on the premises then held by his mother.

The settlement negotiations culminated in the execution of an agreement dated August 25, 1971. In exchange for a monetary payment and the release from his employment contract, Froehlich consented to (a) assume the unexpired lease on the Los Angeles plant, (b) purchase all the physical assets owned by Russ at the Los Angeles facility including all sewing machines, tables, and office equipment, and (c) ship Russ' remaining inventory to the purchasers thereof at the direction and expense of Russ. In addition, Froehlich consented to a provision akin to a covenant not to compete wherein he agreed:

<sup>1</sup> The Union has never been certified following a Board-conducted election nor has its majority status in the unit ever been established through production of the requisite number of authorization cards. Nevertheless, the

parties adhered to the provisions of the 1969 collective-bargaining agreement for over 2 years, including the dues deduction provision, without objection.

(a) Not to manufacture, or cause to be manufactured, garments from a set of patterns which duplicates an existing set of patterns used for a style now being made and sold under the Charmfit by Youthcraft label, and specifically not to manufacture, or cause to be manufactured, the wireless underwire bra or the new covered separator bra.

(b) Not to manufacture, or cause to be manufactured, garments from a set of patterns which duplicates a set of patterns used for a style sold under the Charmfit label or the Charmfit by Youthcraft label, which patterns were designed by Harry W. Froehlich or under his direction.

(c) Not to use the same or substantially similar style number designations or identifications as those used by Youthcraft/Charmfit.

Thereafter, on September 10, 1971, Respondent was incorporated as Radiant Fashions, Inc., with Froehlich as the sole stockholder. Respondent commenced operations at the former Charmfit Los Angeles facility approximately 2 weeks later on September 25, 1971.

Soon after opening, Respondent made several alterations in the physical layout of the plant. The interior was redesigned in order to relocate some of the working areas, approximately 20 percent of the interior floor space was sublet, and 15,000 square feet of the parking space was relinquished. Moreover, some of the equipment acquired from Charmfit was dismantled and placed in storage.

Unlike Charmfit which continues to be a manufacturing concern engaged in the business of designing, manufacturing, and marketing its own products to retail outlets on a nationwide basis, Respondent commenced operations strictly as a sewing subcontractor in the Los Angeles area. As such, Respondent neither designed nor marketed products of its own. Instead, materials were received from a jobber, certain prearranged sewing operations were performed by Respondent thereon, and the completed units were returned to the jobber for distribution and sale.

Initially, 80 percent of Respondent's work was performed for Olga Company, a manufacturer of brassieres for whom Charmfit had never done any work. Subsequently, Respondent performed various sewing operations on men's and women's bicycle shirts and women's bikini bathing suits for the Catalina Company, also a concern for whom Charmfit had never done any work. During Respon-

dent's initial period of operation, Olga and Catalina constituted its principal customers.

In view of the fact that Respondent contracted to perform work on garments other than brassieres, it became necessary to make minor modifications in the sewing machines acquired from Charmfit and to purchase certain additional equipment. In addition, the new and modified equipment required skills for which the initial complement of operators hired by Respondent had to be trained.

The record indicates that as of September 30, 1971, 5 days after commencing operations, Respondent employed 10 unit and 5 nonunit employees, all of whom had formerly worked for Charmfit.<sup>2</sup> On that date, the Union demanded that it be recognized as exclusive bargaining representative of Respondent's employees. Froehlich refused this request. Within a month thereafter, the initial 8(a)(5) and (1) charges in this proceeding were filed by the Union.

During the first 3 months of operation, Respondent's business prospered. By December 14, 1971, the work force had increased to 33 employees, all of whom had previously worked for Charmfit, and all but 5 of whom had been covered by the union contract.<sup>3</sup> In addition, there was a substantial carryover of supervisory personnel, a majority of whom were assigned to the same or similar positions to those which they had occupied with Charmfit.

At the time of the hearing in September 1972, Respondent employed 75-80<sup>4</sup> employees (two-thirds of Charmfit's normal complement) and was then engaged in the design, manufacture, and sale of its own style of brassiere having evolved from a sewing subcontractor into a full-fledged manufacturer. Respondent currently maintains a sales force of five individuals, none of whom were ever employed by Charmfit, and competes with Charmfit in those geographical areas where their marketing efforts overlap. Sears, Roebuck & Co. currently constitutes Respondent's primary customer and accounts for 50-60 percent of Respondent's total production. Although Sears at one time had been a customer of Charmfit, their business relationship terminated well before the cessation of operations in Los Angeles and the vast majority of goods sold to Sears were manufactured at plants other than the Los Angeles plant.

On these facts, the Administrative Law Judge concluded that Respondent was a successor-employer to Charmfit whose refusal to bargain with the

<sup>2</sup> Charmfit's normal complement of employees at the Los Angeles plant numbered between 110-120.

<sup>3</sup> Since Respondent informed the employees that its operations would be nonunion, all but three of them had ceased paying dues to the Union by the time they were hired by Respondent. In fact, most of the 28 employees who had been covered by the union contract when employed by Charmfit ceased

paying dues shortly after their termination in June. The Union has presented no evidence that it currently represents a majority of Respondent's employees.

<sup>4</sup> Of the 42-47 additional employees hired by Respondent after December 14, 1971, there is no evidence as to how many, if any, were former employees of Charmfit.

Union violated Section 8(a)(5) and (1) of the Act. We do not agree.

At the outset, it should be noted that there are present in this record certain factors which we have relied on in the past in finding successorship. Thus, when Respondent commenced operations in September 1971, it was engaged in a business related to that of Charmfit although on a reduced scale. Moreover, its business was run at the same location, utilizing much of the same basic equipment, and employing a reduced work force consisting mainly of employees of the predecessor company under substantially the same supervisory authority.

We have long recognized, however, that the crucial inquiry in determining whether a purchaser is a successor for purposes of Section 8(a)(5) is the continuity of the employing industry, *Galis Equipment Company, Inc.*, 194 NLRB No. 124, and that in making this inquiry the totality of the circumstances surrounding the transfer must be considered. *Lincoln Private Police, Inc.*, 189 NLRB No. 103. Accordingly, in cases similar to the instant case, in which all or most of the above-described factors were present, we nevertheless refused to find successorship when persuaded that countervailing elements existed which destroyed the continuity of the employing industry. E.g., *Norton Precision, Inc.*, 199 NLRB No. 140. We are so persuaded by the record in this case.

First, when Charmfit ceased production and terminated the employees in June, there were at that time no plans to sell the Los Angeles facility to Froehlich. The possibility of such a sale was raised for the first time the following month in conjunction with discussions for a settlement of Froehlich's employment contract. It was not until August 25 that the sale was consummated and 1 month passed thereafter before operations actually commenced. Consequently, there was a hiatus of between 2 1/2 and 3 months between the time that Charmfit shut down completely and Respondent began production.

While it is true that all of the employees hired by Respondent within the first 3 months of operation were former Charmfit employees, it cannot be said that a sudden change in the employees' employment relationship was brought about by the sale of the plant and equipment to Respondent. At the time of their termination by, and receipt of severance pay from, Charmfit there was absolutely no basis whatsoever for any expectation on the part of the employees that their employment would ever be resumed at the Los Angeles plant; much less by a corporation which was then nonexistent and whose formation had not as yet been contemplated by anyone. Although not in itself controlling, the lengthy hiatus in resumption of production at the plant, and in the employment of those employees

eventually hired by Respondent, is a significant factor in determining whether there exists a continuity in the employing industry. *Norton Precision, Inc.*, *supra*; *Gladding Corporation*, 192 NLRB No. 40; *Ellary Lace Corp.*, 178 NLRB 73.

Second, the record adequately demonstrates that rather than purchasing an ongoing business enterprise from Charmfit, Respondent only purchased the assets of one segment of such an enterprise. For example, Charmfit continues to manufacture many items at its Brooklyn and Puerto Rico facilities which are marketed in competition with Respondent's products. Moreover, Respondent is precluded by the terms of the agreement settling Froehlich's employment contract from manufacturing any items which duplicate patterns utilized by Charmfit, many of which were created by or under the direction of Froehlich himself. Also, Respondent did not undertake to produce any products for Charmfit, assume any of its liabilities (except for the lease), or assume any accounts receivable. Indeed, all of the inventory on hand at the time of sale, whether finished or unfinished, was either shipped to Brooklyn or to the purchasers thereof, at the direction and expense of Charmfit.

It is also significant in this regard that Respondent acquired virtually none of Charmfit's customers as a result of the sale. Initially, almost all of Respondent's work was done for two customers, Olga Company and Catalina Company, neither of which had ever done any business with Charmfit. Currently, 50-60 percent of Respondent's business is with Sears, Roebuck & Co., a customer with whom Charmfit was not doing business at the time of the sale and, in any event, never a significant customer of the Los Angeles facility. It is a fair inference, therefore, that any overlapping of customers which may currently exist was achieved by Respondent not through the exchange with Charmfit, but rather by virtue of successful marketing techniques. Again, while these factors, particularly the virtual absence of a carry-over of customers, are not to be taken as controlling, they are nevertheless significant in determining whether there is a continuity in the employing enterprise. *Gladding Corporation, supra*; cf. *Lincoln Private Police, Inc., supra*.

Finally, we consider it important to analyze the differences between the market which Charmfit abandoned in Los Angeles in June and the market which Respondent entered in September. As noted earlier, Charmfit was a manufacturing concern which designed, manufactured, and sold ladies' brassieres under its own labels to various retail outlets. Respondent, on the other hand, commenced operations not as a manufacturer but as a sewing subcontractor. Thus, Respondent initially did no

designing, did no marketing, and did not produce any items under its own label. Instead, Respondent merely performed certain prearranged sewing operations on materials supplied by its customers. In addition, Respondent worked on garments other than brassieres, including bicycle shirts and bathing suits, thereby necessitating modifications in some of the existing equipment, the purchase of certain new equipment, and the retraining of several employees. Alterations such as these in the methods of production, type of market supplied, and kinds of products produced have frequently been utilized in determining whether there has been a substantial change in the nature and character of the employing industry. *Norton Precision, Inc., supra.*

On balance, we find that the lengthy hiatus in operations, the evidence pointing towards a purchase of assets rather than the purchase of an ongoing business, the absence of any significant carryover in customers, and the differences in the markets supplied by Charmfit and Respondent all indicate an extinguishment of the continuity of Charmfit's business enterprise. Accordingly, we find that Respondent is not a successor to Charmfit for purposes of applying the obligations of Section 8(a)(5) of the Act and shall therefore dismiss the complaint in its entirety.

#### AMENDED CONCLUSIONS OF LAW

Delete paragraphs 3 and 4 of the Administrative Law Judge's Conclusions of Law and substitute therefor the following:

"3. By refusing to recognize and bargain with the Union as the collective-bargaining representative of its employees since September 30, 1971, Respondent has not engaged in conduct violative of Section 8(a)(5) and (1) of the Act."

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

<sup>1</sup> Local 496 of the International Ladies' Garment Workers' Union, AFL-CIO.

<sup>2</sup> Served on Radiant Fashions, Inc., Respondent herein, on October 26, 1971.

<sup>3</sup> The Charging Party in the amended charge is Local 482. The amended charge was served on Respondent on July 28, 1972.

<sup>4</sup> The complaint alleges "It having been charged by Local 482, etc." Therefore, the complaint correctly asserts that the amended charge supersedes the original charge.

<sup>5</sup> The record is hereby amended as follows: P. 24, l. 6, change November

## DECISION

### STATEMENT OF THE CASE

DAVID E. DAVIS, Administrative Law Judge: This case was heard by me on September 26, 1972, at Los Angeles, California, pursuant to a charge filed by the Union<sup>1</sup> on October 26, 1971,<sup>2</sup> amended on July 28, 1972,<sup>3</sup> and a complaint issued on July 28, 1972, by the Acting Regional Director for Region 31 of the National Labor Relations Board, herein called the Board.<sup>4</sup> The complaint alleged that Respondent as the successor of Charmfit of Hollywood, Inc., herein called Charmfit, was under an obligation to recognize and bargain with the Union because of the Union's majority status at all material times. As Respondent has refused to recognize and bargain with the Union, the complaint alleges that Respondent thereby has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. Respondent in its answer, while admitting certain allegations of the complaint denied that it is the successor of Charmfit or that it has engaged in any unfair labor practices.

Upon the entire record<sup>5</sup> in this proceeding, including my observation of the witnesses and after due consideration of the posthearing briefs, I make the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE COMPANY

Respondent is a California corporation with its principal place of business located in Los Angeles, California, where it is engaged in the business of manufacturing and selling ladies' intimate apparel including brassieres and bathing suits. For the 12-month period ending September 1972, Respondent in the course and conduct of its business operation will have manufactured, sold, and shipped finished products valued in excess of \$50,000 to points located outside the State of California and for the same time period will receive goods and materials valued in excess of \$50,000 from points outside the State of California. As the above jurisdictional facts are admitted, I find that Respondent is an employer within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

##### II. THE UNION INVOLVED<sup>6</sup>

The complaint alleged, Respondent admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

"3" to "23"; P. 78, l. 25, change first "1971" to "1967."

<sup>6</sup> None of the parties raised any questions concerning the identity of the Union involved. I assume that Locals 482 and 496, as well as Los Angeles Dress and Sportswear Joint Board are acting in unison under the aegis of the International whose representatives participated in the events, negotiations, and contracts with Charmfit. I will abide by the parties' apparent understanding that there is no issue as to the Union's identity. Accordingly, hereafter, reference to the Union is a collective term applicable to Locals 496, 482, the Joint Board, and the International.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Background

The basic background facts are not in dispute.<sup>7</sup> They may be summarized as follows: In 1957, Harry W. Froehlich, together with his brother, each owned 50 percent of the stock of Charmfit. Harry W. Froehlich was its president. He continued to be president of Charmfit until October 23, 1967, when it merged under a sales agreement with Russ Togs, Inc., herein called Russ, a New York-based corporation. Charmfit, at that time, chiefly manufactured brassieres although some related items, like garter belts, were also manufactured. The sale to Russ included all items owned by Charmfit, including all the stock owned by Froehlich. Simultaneously with the sale, Froehlich entered into an employment agreement with Russ which ran to October 31, 1972. Froehlich continued, under his employment agreement, to hold the office of president of Charmfit which then became a wholly owned subsidiary of Russ. As president, Froehlich was responsible for the day-to-day operations of Charmfit from its plant located at 11900 West Olympic Boulevard, Los Angeles, which was the same location it had occupied prior to the sale to Russ. In April 1969, Charmfit entered into a collective-bargaining agreement<sup>8</sup> with the Union effective from April 21, 1969, to January 31, 1972, covering all production and maintenance employees. Froehlich, as president of Charmfit, signed the agreement. On April 30, 1969, Froehlich also signed an amendment<sup>9</sup> to the aforesaid labor agreement. The evidence showed that after Charmfit entered into the above labor agreements, it continued to manufacture the same products, chiefly brassieres, with the same employees performing similar tasks at the same location in Los Angeles.

About April 1971, Froehlich received instructions from Russ management officials to cut production in the Los Angeles plant and to phase out the operations at the Charmfit plant so as to cease operations as of November 30, 1971. As a result of these instructions, Froehlich had two or three meetings with Sam Schwartz, manager of the Western States Region of the ILGU, AFL-CIO, Max B. Wolf, educational and political director of the International Union,<sup>10</sup> and Millstein, a business representative of the Union.

By July 1, 1971, there was no one working at the Charmfit location in Los Angeles, production having ceased during the latter part of June 1971. Froehlich, during the period employees were being laid off, had meetings, referred to above, with union representatives. Froehlich, to preserve his employment agreement and to provide work for the employees, was interested in keeping the shop going and asked the Union to enlist the aid of the union representatives located in New York to keep Charmfit operating even if it meant shorter hours. According to Froehlich, the union representatives reported that they had tried but were unsuccessful.

Sometime in June 1971, Froehlich entered into negotia-

tions with Russ regarding a settlement of his employment agreement which had about a year and half to go. At first, the discussions centered around the amount of compensation he was to receive. However, sometime in July 1971, Froehlich was notified that Russ wanted Froehlich to purchase the Charmfit plant and secure its release from the current lease for the premises which had another year and 4 or 5 months to run. An agreement was reached as of August 1, 1971, under which Froehlich purchased all the physical assets owned by Russ at the Charmfit plant in Los Angeles including all sewing machines, tables, and office equipment effective as of August 1, 1971.<sup>11</sup> As Froehlich's mother was the owner of the property and the lessor of Russ, Froehlich was able to secure Russ' release from the terms of the outstanding lease and personally assumed the obligations of the lease. It was also agreed that Russ would notify the Union that Charmfit would cease operations on a certain date. Contrary to Froehlich's understanding, Russ did not notify the Union until November 23, 1971.<sup>12</sup>

About September 10, 1971, Froehlich formed the new corporation, Radiant Fashions, Inc., Respondent herein, and commenced operations about September 25, 1971.

#### B. The Refusal to Bargain

Froehlich, testifying as a witness called by the General Counsel,<sup>13</sup> testified that he put a "help wanted" sign out at the premises; that he was under the impression that some of the former employees of Charmfit saw the sign and spread the news by word of mouth that Respondent was hiring; that he hired Tony La Capria as production manager for Respondent; that La Capria had been production manager for Charmfit; that he was not aware that La Capria was calling Charmfit employees to come back to work for Respondent; that from the approximate date production commenced on September 25, 1971, until December 13, 1971, all of the production employees were former employees of Charmfit; that the designer, cutter, and other supervisory employees were also former Charmfit employees; that the sewing machines and other equipment being used during this period of time were the same ones that had been purchased from Charmfit; that ladies' brassieres were being manufactured; that he had instructed La Capria to inform employees that they were coming to work for a new firm which had no connection with Charmfit; that he told La Capria to make sure the employees knew this as he didn't want to have anyone disappointed at a later date when they found that seniority would not be carried over from Charmfit to Radiant; that he also told La Capria to tell the employees that Respondent would have its own medical plan; that the beginning pay rate was established at \$2.10 per hour; that currently Respondent had about 75-80 employees; that Sears Roebuck, for whom Respondent manufactures brassieres under a Sears Roebuck label, accounts for approximately 50-60 percent of Respondent's brassiere production; that Sears Roebuck was also a customer of Charmfit until early in 1971. Finally, Froehlich testified

<sup>7</sup> The uncontroverted testimony of Harry W. Froehlich, herein called Froehlich, is the principal source of the background.

<sup>8</sup> G.C. Exh. 2. (Local 496.)

<sup>9</sup> G.C. Exh. 3. (Substituting the L. A. Joint Board.)

<sup>10</sup> One of ILGU agents assigned to administer the contract at Charmfit.

<sup>11</sup> G.C. Exh. 5.

<sup>12</sup> G.C. Exh. 4.

<sup>13</sup> Under Sec. 43-B under the Federal Rules of Civil Procedure.

that Schwartz and Wolf visited the plant sometime in October 1971 and that it was after this visit that he instructed La Capria to tell the employees that Respondent was operating as a nonunion shop.

Sam Schwartz, manager of the Western States Region of ILGU, testified that the Los Angeles area has been under his jurisdiction for 35 years; that during that time he has been continually employed as a staff member of the ILGU; that he has had the title of manager for the past 2 years; that, acting in behalf of the Union, he had signed the agreements which had been introduced in evidence as General Counsel's Exhibits 2 and 3; that he had also negotiated a cost-of-living increase with Froehlich in 1970 when Froehlich was representing Charmfit; that he and Wolf had visited Respondent's plant on September 30, 1971; that when they reached the premises they saw a paper sign reading "Radiant, Incorporated"; that they found the front door locked but gained entrance through the side door; that they then met La Capria and the following conversation took place:

La Capria: I was expecting you fellows.

Wolf: Why?

La Capria: We are not a Union Shop anymore.

Wolf: Whoever told you that?

La Capria: You better wait for Mr. Froehlich. Let's go for coffee.

The three of them then drove to a nearby restaurant and Schwartz asked La Capria, "What's this all about?" La Capria replied, "I have been calling the people on the phone and asking them if they want to come back. This is a non-union shop. If they want to come back, they are welcome." Schwartz asked where he got the information that it was a nonunion shop and La Capria said that when Froehlich arrived they would discuss it with him. When they returned to the plant about 9:30 a.m., Froehlich was in his office and opened the conversation saying, "I guess you want to know what the union status is." Schwartz replied, "I know what the union status is." Froehlich then addressed himself to La Capria and asked, "Tony, have we asked the people if they want to come back under non-union conditions?" La Capria replied in the affirmative and Schwartz said, "We have a union. The workers are all members of the Union. We are their bargaining agent." Froehlich then said, "Well, we told anybody who wants to work here they could work but it is a non-union shop. As a matter of fact, we are taking out an insurance policy for them." Schwartz then testified that he asked Froehlich about Radiant Fashions, Incorporated; that Froehlich replied he bought the equipment, his mother owned the building, and he had taken over the lease with a condition not to manufacture a certain type of wire brassiere; that, other than that, he could manufacture whatever he pleased and that he was getting work from "Olga Brassieres." Schwartz testified that at this point he left, saying that there was nothing else to discuss and that Froehlich would hear from him. Schwartz further testified that only one former employee of Charmfit had withdrawn from the Union and that was because she had to leave the State;

that the labor agreement with Charmfit contained a union-shop clause, and a checkoff provision; that a list<sup>14</sup> had been prepared showing when all the Charmfit employees had last paid their union dues. Schwartz, after inspecting the list<sup>15</sup> of employees at Radiant on a certain date, testified that with the exception of three employees all other employees appearing on the list of Radiant employees were included on the list showing employees who had paid union dues. (G.C. Exh. 7.)

On cross-examination, Schwartz testified that he did not know Charmfit had ceased operations prior to his visit in September; that he had learned there was a layoff through some of the employees who came into the union office to have their cards signed to the effect they were unemployed; that when he met Froehlich in September and told him that the Union had a contract, Froehlich replied,

We are not a union shop. We have asked all the people before we hired them—we told them that there's not going to be a union shop.

Max B. Wolf, called by the General Counsel, stated that he had been a staff representative of the ILGU for 27 years and that he accompanied Schwartz on the September 30, 1971, visit to Respondent's plant. His testimony confirmed Schwartz' account of the conversation with Froehlich.

Elma Sanchez testified that she was employed by Charmfit for about 5 years until June 1971; that she worked on the labeling machine and a computer that made price tickets; that sometime in September or October 1971 she had a telephone conversation with La Capria who asked her to return to work; that she had heard from some of her former coworkers that the shop had opened up; that she called La Capria, but he said that at that time another girl was making up labels and price tickets; that there wasn't much work then, but he would let her know; that at a later date he called her and told her the shop was nonunion and that it was a different company. As Sanchez, during this period, was caring for her two grandsons, she told La Capria that she was unable to return to work at that time. La Capria called her again and she was still unable to go back to work until approximately 1 week before the hearing, about September 21, 1972. When she returned to work, La Capria told her it was a different factory and that it was nonunion. She agreed to go back to work at a starting rate of \$2.10 per hour with a promise that in 2 months she would get a raise of 10 cents per hour.

It was stipulated by the parties that, if Grace Mori were to testify, she would state that La Capria talked with her in September 1971 and told her that the plant was nonunion, that the pay was \$2.10 per hour, and that they had a medical plan.

Froehlich, recalled as a witness for Respondent, testified that in the spring of 1971 when he was told by the Russ officials at a meeting in New York to phase out the Los Angeles operations, it was planned that there would be an orderly transfer of production to the Puerto Rico plant of the parent company. Froehlich, at that time, was given a schedule detailing what was to be produced in Los Angeles over a given number of months. Thereafter, he received periodic instructions from New York as to what to transfer

<sup>14</sup> G.C. Exh. 7.

<sup>15</sup> G.C. Exh. 6.

to Brooklyn or Puerto Rico. Following instructions, Froehlich cut the merchandise he was scheduled to produce and, after the cutting was completed, the dies or patterns were shipped to Brooklyn. Froehlich then shipped half of his inventory of finished products to Brooklyn where shipments would thereafter originate, the other half of the finished products continued to be shipped by Charmfit to customers. After Froehlich had been notified of the arrival of the merchandise (finished products) sent to New York, all orders received in Los Angeles were forwarded to New York for shipment out of Brooklyn. The process of phasing out commenced early in May and the complete shutdown of the plant occurred the latter part of June, possibly in July, 1971. The business records were sent to New York after a representative from New York had inspected them and determined what records they would need. The only records remaining at Charmfit concerned the employment data of employees. Froehlich, continuing his testimony, asserted that Charmfit presently is a going concern manufacturing brassieres in Brooklyn and Puerto Rico and selling these items on a national basis. Charmfit has a national salesforce with salesmen located on the West Coast. After Radiant started its operations, 4,000 of the approximately 19,000 square feet covering Charmfit's lease was sublet. Radiant also surrendered a 15,000-square-foot area that Charmfit used as a parking lot. Froehlich purchased two automotive vehicles owned by Charmfit, selling one at a later date. Froehlich also testified that he is currently building a salesforce, none of whom was ever employed by Charmfit, and that Radiant is in competition with Charmfit. On cross-examination, Froehlich conceded that currently Radiant customers were the same as those with whom Charmfit did business.

### C. Analysis and Conclusions

As recited above, the basic facts are essentially not disputed. The primary question requiring resolution is whether Respondent is a successor within the meaning of the legal precedents applicable to this case. I find adequate support for the General Counsel's position on this issue in the Supreme Court's recent decision in *Burns International Security Services, Inc.*,<sup>16</sup> and related cases.

In *Burns*,<sup>17</sup> the Supreme Court affirmed the Board's adoption of the Administrative Law Judge's finding that Burns had a duty to bargain, which arose when it selected as its work force the employees of the previous employer to perform the same tasks at the same place they had worked in the past.

Here, unlike the *Burns* situation, however, the employees did not participate in an election of a collective-bargaining representative. The claim of majority status by the Union rests upon the current membership of all except five employees in the appropriate collective-bargaining unit.<sup>18</sup> The evidence shows that Charmfit, Respondent's predecessor, entered into a labor agreement with the Union which included a union-shop proviso and a checkoff. This agreement has been honored since April 1969 and,

pursuant to that agreement, all employees of Charmfit who are now employees<sup>19</sup> of Respondent are members of the Union having paid dues to the Union.<sup>20</sup> As Charmfit operations ceased in July 1971, the payment of dues thereafter and their retention of membership in the Union reflects the continuing desire of the employees to have the Union continue as their collective-bargaining representative.

Froehlich admitted that, pursuant to his instructions, La Capria advised former Charmfit employees that Respondent was operating "non-union." The evidence shows and I find that this in fact was a condition of employment. Obviously, when confronted with such a choice, employees out of work consented to return under this condition. It seems significant that no employee renounced membership in the Union after employment by Respondent under the nonunion conditions. I believe that, under all the circumstances, the presumption of continued majority in this case is rather strong. Accordingly, a finding seems warranted that Respondent unlawfully refused to recognize and bargain with the Union on September 30, 1971, when the Union representatives, Schwartz and Wolf, met with Froehlich.

Respondent in its brief argues that it had a good-faith doubt of the Union's majority status on September 30, 1971. In support of this argument, it made an offer of proof that La Capria would testify that many of the girls were dissatisfied with the Union because the Union was not doing anything to help keep the plant open, and that La Capria told Froehlich of the girls' dissatisfaction. This testimony was rejected as improper because it was hearsay. In my opinion, even if the testimony were admitted and was regarded as truthful, it lacked sufficient probative value and impact to overcome the presumption of majority status. I regard Froehlich's additional testimony that he, himself, was told by various employees of their dissatisfaction with the Union as of slight importance with regard to this presumption. I find, and the evidence amply demonstrates, that the employees' complaints about the Union to La Capria, or to Froehlich, played no part in Froehlich's decision to operate nonunion and his subsequent refusal to recognize and bargain with the Union. The record is clear that La Capria and Froehlich had never ascertained or made a determination as to employee sentiment with regard to the Union, rather Froehlich ordered La Capria to tell the employees that they, when they came back to work, would be employed under nonunion conditions and this is what La Capria told the employees. Moreover, when Froehlich met with Schwartz and Wolf on September 30, 1971, he refused to recognize and bargain with the Union not because the Union lacked a majority, but, as Schwartz credibly testified, Froehlich said:

We are not a union shop. We have asked all the people before we hired them. . . . we told them there's not going to be a union shop. . . .

Respondent further argues that substantial differences between Respondent's and Charmfit's work forces, physi-

<sup>16</sup> 406 U.S. 272.

<sup>17</sup> *Supra*.

<sup>18</sup> There is no conflict as to the appropriate unit.

<sup>19</sup> Except five.

<sup>20</sup> G.C. Exhs. 6 and 7. A comparison of these exhibits shows that three employees paid no dues after June 17, 1971; one employee paid no dues after July 21, 1971; while all the other employees paid dues in August 1971 or later.

cal plant facilities, products, nature and extent of business and customers favor a finding that Respondent is not a successor to Charmfit. I disagree. The evidence shows that there has been a substantial continuity of identity in the business enterprise by virtue of the manufacture of substantially the same product at substantially the same place by substantially the same employees for substantially the same customers under substantially the same management. The change in ownership, the change in name, the slight change in product styles are insignificant factors that do not warrant a finding that Respondent is not a successor.

Nor do I regard the decrease in the employee complement and the hiatus of 2 months in production as decisive or substantial factors which would warrant a finding in support of Respondent's contention that it was not the successor of Charmfit.<sup>21</sup>

In agreement with the General Counsel's argument, I find that the presumption of continued majority status is not dependent on independent evidence that the bargaining relationship was originally established by a certification or majority card showing.<sup>22</sup> It is also well established that the presumption is applicable to a successor situation as in the present case.<sup>23</sup>

As Respondent has failed to adduce any credible evidence to rebut the presumption, the presumption must prevail.

Accordingly, I find that Respondent as the successor of Charmfit was obligated to recognize and bargain with the Union on September 30, 1971, in the following unit which I find to be appropriate:

All production and maintenance workers, including shipping and receiving employees, employed by Respondent at its Los Angeles, California, plant, but excluding office clerical employees, guards, watchmen, and supervisors as defined in the Act.

Respondent, as recited above, since September 30, 1971, has refused to recognize and bargain with the Union in the appropriate unit found above and thereby has engaged and

is engaging in conduct violative of Section 8(a)(5) and (1) of the Act. It is so found.

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

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. Respondent, commencing September 30, 1972, unlawfully refused, and continues to refuse, to recognize and bargain with the Union as the collective-bargaining representative of its employees in the appropriate bargaining unit, described as follows:

All production and maintenance workers, including shipping and receiving employees, employed by Respondent at its Los Angeles, California, plant, but excluding office clerical employees, guards, watchmen, and supervisors as defined in the Act.

4. By refusing to recognize and bargain with the Union since September 30, 1971, Respondent has engaged, and continues to engage, in conduct violative of Section 8(a)(5) and (1) of the Act.

#### THE REMEDY

Having found that Respondent has breached its duty to recognize and bargain with the Union, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

In view of the nature of the unfair labor practices found herein which go to the very heart of the Act, I shall further recommend that Respondent cease and desist from in any manner interfering with its employees' rights guaranteed under Section 7 of the Act.

[Recommended Order omitted from publication.]

<sup>21</sup> Cf. *C. G. Conn. Ltd.*, 197 NLRB No. 84. Cf. *Ellary Lace Corp.*, 178 NLRB 73.

<sup>22</sup> *Valleydale Packers Inc.*, 162 NLRB 1486.

<sup>23</sup> *K. B. & J. Young Supermarkets*, 157 NLRB 271, enf. 377 F.2d 463 (C.A. 9)