

Anita Shops, Inc., d/b/a Arden's and Retail Store Employees Union Local 428, Retail Clerks International Association, AFL-CIO. Case 20-CA-7636

June 12, 1974

DECISION AND ORDER

On April 23, 1973, Administrative Law Judge George Christensen issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions combined with a brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We have no difficulty with the conclusion of the Administrative Law Judge that, under the facts here, Respondent is a successor with respect to the store here in issue.

It is also clear enough, under the Supreme Court's decision in *N.L.R.B. v. Burns International Security Services, Inc.*,² that Respondent did not, under the Supreme Court's interpretation of the law, inherit its predecessor's collective-bargaining agreement.

The much more difficult question however is whether, under the facts presented by this record, Respondent was legally entitled unilaterally to set its initial terms and conditions of employment or whether this is one of those "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."³

In *Howard Johnson and Good Foods* we found a violation of Section 8(a)(5) where the successor employers, without prior warning, unilaterally changed the terms and conditions of employment prevailing under the predecessors after already having committed themselves to hire almost all of the old unit employees with no notice that they would be expected to work under new and different terms.

On the other hand, in *Spruce Up Corporation*, 209 NLRB No. 19, we found no such violation when the Respondent, in advance of its takeover, clearly announced its intent to establish a new set of terms and conditions of employment prior to inviting former employees to accept employment.

In the instant case, on approximately May 15, 1972, the predecessor corporation notified the em-

ployees of this store, as well as the other stores in the chain, of the impending change in ownership. So far as we can discern, no commitment was made to employees at this time with respect to Respondent's intentions as to their continuity of employment.

On May 26 Respondent addressed a letter to the Union, the contents of which are set forth in full in the Decision of the Administrative Law Judge. In that letter the Union was advised of Respondent's intent to hire the employees of the predecessor "consistent with the level of personnel which our client determines is needed to man said store." The letter further advised that Respondent intended to install its own set of wages, hours, and working conditions but offered to negotiate an agreement with the bargaining representative "at the earliest mutually convenient opportunity."

According to the testimony, this letter was not received by the Union until May 30, which was the date Respondent commenced operations at the store.

Apparently no communication was made to the employees with respect to either their possibilities for continued employment or their wages and employment terms, if hired, until the actual day of takeover, although the store manager had been advised of the new pay rates and employment terms on May 28.

On or after May 30, each employee at the commencement of her first scheduled day of work was offered employment, but at the same time advised of the newly established wages and terms.

In *Spruce Up, supra*, we said:

We believe the caveat in *Burns*, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

In the instant case there was no advance notice to employees of the new terms, but also no advance commitment as to their employment. There cannot be said to have been any misleading of employees into believing they would all be retained without changes in their employment conditions. But on the other hand, the notice to both the employees and to their bargaining representative was a last minute notice, and was not received by either until the very

¹ While we agree that the record as a whole establishes that Respondent intended to and, in fact, did retain all of its predecessor's unit employees at Store No. 27, we do not agree with, or rely upon, the Administrative Law Judge's finding that such intent is established by Hardcastle's testimony.

² 406 U.S. 272 (1972).

³ *Id.* pp. 294-295; *Howard Johnson Company*, 198 NLRB No. 98; *Good Foods Manufacturing & Processing Corporation, Chicago Lamb Packers Co., Inc.—Division*, 200 NLRB No. 86.

day of takeover. It would thus be difficult to find a much closer borderline case between the doctrine we have applied in *Howard Johnson* and *Good Foods* and the contrary rule of *Spruce Up*. The need to reach what the Supreme Court in *Burns* called an "accommodation between the legislative endorsement of freedom of contract and the judicial preference for peaceful . . . settlement of labor disputes" is, we suppose, the underlying consideration, but it, too, is not an easy accommodation to make under these facts.

Respondent offered substantial evidence to indicate an economic justification for instituting changes in both methods of operation and prevailing conditions of employment. At the same time, the last-minute character of the notice to both employees and their bargaining representative can hardly be said to be the approach most conducive to either good employee relations or the maintenance of peaceful and stable relations with the employees' exclusive representative.

We are faced here, therefore, with the most delicate kind of balance. We note the comment of the Court of Appeals for the Seventh Circuit in *Zim's Foodliner, Inc. v. N.L.R.B.*, 495 F.2d 1131, wherein the court, puzzling over a post-*Burns* application of the successorship doctrine, said, after quoting from the *Burns* decision:

This language indicates to us that the Court did not intend to preclude application of the unilateral changes doctrine to employers who voluntarily adopt pre-existing terms and conditions, but who subsequently have second thoughts in the matter. Perhaps a line need be drawn somewhere, although *Bachrodt*,⁴ if still good law in this respect, would indicate that the period necessary to establish voluntary adoption is quite brief.

Since in this case it cannot be said that there was any period whatever of adoption by the successor of the predecessor's terms and conditions of employment, we conclude, not without reservations, that while the line here is being drawn rather finely, we shall draw it as in *Spruce Up* and find that Respondent was entitled to set its initial terms and conditions of employment. We are influenced in reaching that decision upon these facts by Respondent's clearly expressed willingness to bargain immediately with the employees' exclusive agent, and the absence of the factors of union animus or any attempt by Respondent to rid itself of the Union—factors which were present in *Howard Johnson* and *Good Foods*, *supra*.

Upon the facts in this record, therefore, we find

that Respondent neither made a unilateral change in its terms and conditions of employment nor refused to bargain with the Union, and we shall dismiss the complaint herein in its entirety.

ORDER

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

MEMBER FANNING, concurring:

The issue before us is whether Respondent Arden violated Section 8(a)(5) and (1) of the Act by instituting its own terms and conditions of employment to govern the operations of a store it had purchased from another enterprise even though it intended to and did hire all the employees of the seller, employees who were represented by an exclusive bargaining representative. Considering the relevant circumstances of the case, I do not agree with the Administrative Law Judge that Respondent acted unlawfully, and I would reverse his Decision and dismiss the complaint.

Briefly, the relevant facts are that, on or about May 15, 1972, the employees of the employing industry were advised that Respondent had purchased the operations involved and would take over the operations on May 30. On or about May 26, Respondent advised the Union, the employees' bargaining representative, that it was taking over the operations of the enterprise as of May 30, that it intended to hire the employees, that it stood ready to recognize the Union as the employees' bargaining representative, that it was ready and willing to enter into negotiations to establish the terms and conditions of employment, and that, pending such negotiations, it would place into effect its own terms and conditions of employment which differed from those provided in the contract between the Union and the predecessor. The letter apparently was not received by the Union until May 30. The Union did not reply to the letter and demand bargaining until June 16, at which time it notified Respondent that it expected Respondent to maintain the contract terms in effect until the parties could meet to negotiate the issue. On May 25, Respondent gave the manager of the store a document setting forth the rates of pay and other terms and conditions of employment which would obtain upon Respondent's commencement of operations. The manager, as directed by Respondent, informed the employees of these facts by personal interview and by posting them on the bulletin board.

The foregoing conclusively demonstrates that

⁴ *N.L.R.B. v. Bachrodt Chevrolet Co.*, 468 F.2d 963 (C.A. 7, 1972)

Respondent planned to retain all of its predecessor's employees, and that it therefore could not refuse an appropriate request from the employees' representative for negotiations concerning the terms and conditions of employment it planned to institute.⁵

It is also reasonably clear that the May 15 announcement to employees of Respondent's purchase of the business can be deemed constructive notice to their representative of that fact, and that the representative had adequate opportunity to request bargaining or otherwise inquire as to Respondent's intentions prior to its commencement of operations. The Union did not, however, request bargaining at that time. Respondent nevertheless informed the Union that it stood ready to recognize and bargain with the Union but that, pending such negotiations, it would institute terms and conditions of employment differing from those maintained by its predecessor. In these circumstances, I am satisfied that Respondent has not violated its bargaining obligation.

I so conclude because it is difficult to see how Respondent's institution of such terms and conditions of employment along with its stated willingness to bargain constituted any more of a unilateral change in *its* terms and conditions of employment than did similar action by the respondent in the *Burns* case after its bargaining obligation had matured.⁶ Nevertheless, the Court found that such action was not a violation of Section 8(a)(5) because there was "no evidence that Burns ever unilaterally changed the terms and conditions of employment it had offered to potential employees in June after its obligation to bargain had matured."⁷

I see no reason to impose a greater obligation on Respondent than was imposed upon the successor in *Burns*, particularly as Respondent, unlike Burns, clearly notified the Union that it was ready and willing to negotiate about the terms and conditions of employment upon request of the Union. As I fail to perceive how Respondent's actions herein have obstructed the collective-bargaining process, as there appears to me to be no basis for finding that Respondent had committed itself to maintaining the preexisting terms and conditions of employment, and as Respondent has not rejected a demand for bargaining but instead notified the Union that it was ready to recognize and bargain with it concerning such matters, I find that Respondent has neither made a unilateral change in its terms and conditions of employment nor refused to bargain with the Union.

MEMBER JENKINS, concurring:

I concur in the result reached by the majority in this case.

MEMBER PENELLO, dissenting:

Contrary to my colleagues, for the reasons set forth in my dissenting opinion in *Spruce Up Corporation*, 209 NLRB No. 19, and the attached Decision of the Administrative Law Judge herein, I would find that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing rates of pay and other terms of employment without prior consultation with the Union as, under the principles enunciated by the Supreme Court in *Burns*, "it is perfectly clear that the new employer plan[ne]d to retain all of the employees in the unit. . . ."⁸ Indeed, if anything, this case is stronger than *Spruce Up*, because not only was there an advance commitment to the Union on May 26 by Respondent before the take over to the effect that, "it is the intention of Anita Shops to hire the individuals presently employed" by the predecessor,⁹ which commitment was actually fulfilled when all the predecessor's employees were in fact retained, but, as my colleagues acknowledge, there was no prior notice to the employees of the new terms. In addition, although my colleagues are impressed with "Respondent's clearly expressed willingness to bargain immediately with the employees' exclusive agent," I seriously question the Respondent's sincerity in view of the fact that its May 26 notice of its proposed changes and "offer to consult" was mailed too late to make it possible for the Union, which only received the letter on May 30, to respond to the "offer" prior to the effectuation of the changes.

⁵ *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 294-295. See also my separate opinion in *Spruce Up Corporation*, 209 NLRB No. 19.

⁶ *Burns*, *supra* at 295. In *Burns*, the respondent commenced operations on July 1 but the Court noted that its bargaining obligation matured on June 12 after it hired a majority of employees in the unit, hiring which occurred after a series of employment interviews in which employees were told that Burns could not live with their union's contract and they would have to join another union.

⁷ *Ibid.*

⁸ *Burns*, *supra* at 294-295.

⁹ Unlike my colleagues, I do not agree that the intent to retain the predecessor's employees must be manifested directly to the employees. The Court in *Burns* set forth no such requirement. Moreover, my colleagues in *Spruce Up* did not find fatal that respondent's commitment that "all barbers who are working will work" was made to the union. In fact they assumed that this statement to the union was an "invitation to the previous work force to accept employment" (*Spruce Up, supra*), but found that it was not perfectly clear that the respondent planned to retain all of the employees in the unit because the respondent had announced new terms prior to or simultaneously with his offer to the predecessor's employees to accept employment under those terms.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge: On

October 30, October 31, November 1, and November 9, 1972,¹ I presided over a hearing at San Francisco, California, to try issues raised by a complaint issued September 6 on the basis of a charge filed by the Union on July 14. The complaint alleged that Anita Shops violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (hereafter the Act), following purchase of a San Jose, California, store and retention of the seller's employees, by changing rates of pay and other terms of employment of those employees without prior consultation with the Union, their representative under the prior owner.

Anita concedes it retained the seller's employees and made changes in their rates of pay and other terms of employment but contends it had the right to do so because: (1) it was not a successor employer; (2) its action was legally permissible under the Act; and (3) the Union and the employees either were estopped from asserting any rights under the Act or waived same.

The issues joined by the parties and litigated at the hearing were: (1) whether Anita was a successor employer as that term is defined and applied under the Act; (2) assuming Anita was a successor employer, whether Anita was under a duty to consult with the Union prior to making changes in the rates of pay, wages, hours, and other terms of employment of its employees represented by the Union; and (3) assuming the answer to the preceding two questions is affirmative, whether the Union and the employees by their conduct either are estopped from or waived their rights under the Act.

The parties appeared by counsel at the hearing and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Briefs have been received from the General Counsel and Anita.

Based on my review of the entire record,² observation of the witnesses, perusal of the briefs and research, I enter the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer admitted, and I find that Anita, at all times material, was an employer engaged in commerce in a business affecting commerce, and the Union was a labor organization, as those terms are defined in Section 2(2), (5), (6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

For a number of years prior to 1972, Lucky Stores, Inc., (hereafter called Lucky) through Gemco, a wholly owned subsidiary, controlled Tanne-Arden Corporation (hereafter called Tanne-Arden), an operator of approximately 35 retail stores in Arizona and California selling women's apparel under the Arden name. One of the Arden stores,

27, was located at 57 South First Street, San Jose, California.

On June 10, 1960, the Board certified that the Union had been designated by a majority of store 27's nonsupervisory employees as their collective-bargaining representative (Case 20-RC-4191).

The Union and Tanne-Arden signed a succession of contracts covering store 27's employees within the unit, including a contract for a term extending from September 1, 1968, through August 31, 1971. On April 5, a supplement to that contract was agreed to, extending the contract's basic terms to August 31, 1973, with certain changes in wage rates and the health and welfare provision.

B. The Sale

While negotiations for the contract supplement just noted were in progress, Lucky approached Anita with a proposition that the latter purchase the Tanne-Arden chain. Anita, at that time, operated approximately 70 retail stores in the Western United States selling women's apparel under the Anita name.

In the course of the discussions between Lucky and Anita, the latter was advised of collective-bargaining contracts covering employees at various Tanne-Arden stores, including the recently concluded April 5 supplement covering store 27.

Sometime that month³ an agreement was reached between Lucky and Anita for the sale of the Arden name, fixtures, and inventories to Anita and assignment to Anita of the leases at all the Tanne-Arden stores.⁴ It was also agreed between Lucky and Anita that the latter would assume physical control and operation of the Tanne-Arden stores the day after Memorial Day, i.e., on May 30.

C. Notice of the Sale and New Rates and Terms of Employment

On approximately May 15, Lucky advised the Tanne-Arden employees represented by the Union at store 27 of the prospective change in ownership to be effected May 30.

On May 26, Anita addressed the following letter to the Union:

As you may be aware, the Arden store located at 57 South First Street, San Jose, California, at which members of your Union are employed under a Collective Bargaining Agreement with Tanne-Arden, Inc., is undergoing a change of ownership. Our client, Anita Shops, Inc., is in the process of purchasing the fixtures, and perhaps the inventory, of that store, and assuming the lease for the premises.

This is to advise you that it is the intention of Anita Shops to hire the individuals presently employed by Arden at the above location onto its payroll, effective with the payroll period covering the work week of May 29, 1972, consistent with the level of personnel which our client determines is needed to man said store.

Hardcastle, Anita's director of store operations and a supervisor of Anita acting on its behalf, testified that prior to assuming operation of store 27, Anita decided to retain all of store 27's employees (further substantiation lies in the fact that Anita so stated in a letter to the Union mailed 4 days prior to the date Anita commenced operation of store 27). ☐

¹ Read 1972 after all subsequent date references omitting the year.

² Pursuant to an unopposed motion of the General Counsel, the record is corrected.

³ The record does not reveal the specific date.

⁴ No value was placed on goodwill since the Tanne-Arden stores were operating at a loss. While not in the sales/purchase agreement, J.

Anita Shops will recognize, and not deny, your status as the exclusive bargaining representative of said employees employed at the above address, upon demand. If it is your position that you represent a majority of employees in an appropriate unit, please so advise us.

Upon receipt of said advice, we stand ready to bargain with you concerning the establishment of a collective bargaining contract between your Union and our client covering the wages, hours, and working conditions of said employees at the earliest mutually convenient opportunity.

Since our client has no legal obligation to adopt or implement the terms and conditions of your contract with Tanne-Arden, it will not do so. Thus, the aforesaid negotiations will be for the establishment of terms and conditions of employment mutually acceptable to our client and your organization. Pending the negotiation of that contract, we will, effective with the payroll period covering the week of May 29, 1972, be installing the Anita Shops compensation programs, policies, and practices for subject employees. The commencement of coverage under the Anita Shops benefit programs will be timed so that no employee is left without coverage.

We shall anticipate your reply at your earliest convenience.

The Union received the letter on May 30.

On May 28, Rosemary Schubert, Anita's vice president of finance and comptroller, contacted Rosemary Manfre, manager of store 127,⁵ and acquainted Manfre with various forms and records utilized by Anita, instructed Manfre regarding new sales and cash register procedures, and informed her what rates of pay and other terms of employment store 127's employees were to receive.⁶ The rates, etc., were lower than those under the contract supplement and contract then in effect between Tanne-Arden and the Union.

Schubert also gave Manfre a document setting out the rates of pay and other terms of employment of the store personnel, instructed Manfre to inform each employee of the contents thereof before they started work on or after May 30, and instructed Manfre to post the document for employee reference. The document read as follows:

WAGES AND BENEFITS

1st 700 hours	\$2.067
2nd 700 hours	\$2.298
3rd 700 hours	\$2.350
Thereafter	\$2.430

Holidays:

New Year's Day, Memorial Day, 4th of July, Labor Day, Thanksgiving, Christmas and the Employee's anniversary date. Any employee who works the month

of February, in any year, in lieu of Washington's Birthday, will receive an additional day off with pay, at a time mutually agreeable with employer and employee.

Vacations:

After 1 year - 1 week
After 2 years - 2 weeks
After 5 years - 3 weeks

Sick Leave:

Sick leave is earned at the rate of one-half (1/2) day for each full month worked. Part time employees will be paid pro-rated sick leave. Sick leave starts with the 2nd day of absence due to illness except in the case of hospitalization, when it starts with the first day.

H & W:

Full time employees are covered by a fully paid major medical health insurance plan following 30 days of employment.

Part time employees who average 80 hours a month are covered by the same plan following 90 days of employment.

Included in the health insurance plan, is \$2000 life insurance on the employee.

Pension:

Employees are covered by the Company Pension Plan if they meet the minimum requirement of working 1040 hours in a calendar year.

Manfre carried out Schubert's instructions to the letter—acquainting each employee with the new rates of pay and other terms of employment listed on the document quoted above, as each employee reported for work on and after May 30.⁷ Manfre met employee protests over the lower rates with the comment they could "take it or leave it." The unit employees all chose to "take it."

D. Continued and Changed Operations and Procedures

1. Continued

Anita continued to operate the store in the same location as the previous owner, namely, at 57 South First Street, San Jose, California. Anita continued to utilize the Arden name on the store. Anita continued to use the same fixtures and supplies (racks, hangers, boxes, and plastic bags for packing merchandise sold, cash register, etc.). Anita continued the same managerial and bargaining unit personnel in its employ. The employees exercised the same skills and performed the same duties they had exercised and performed under Tanne-Arden. The basic character of the business remained unchanged—the retail sale of women's apparel and children's clothing (Anita continued

30 and June 5, contained their new rate and they admittedly consulted with Manfre in filling out blanks in those applications. In addition, Manfre's clear and unequivocal testimony to her advising the employees of their rates under Anita on May 30-31 and May 30 posting of the document was corroborated by Anita's district director, Shirley Bradley, who saw the posted document near the weekly work schedule on May 31, and on weekly visits thereafter, in a position where the employees could not help but notice (when checking their weekly work schedules).

⁵ Renumbered store 127 by Anita.

⁶ All employees at the store on Tanne-Arden's payroll, including Manfre, continued in Anita's employ at store 127.

⁷ I discredit the testimony of several employees to the effect they were not informed until a considerable time had elapsed after their employment by Anita of their new rates of pay and that they were unaware of the existence of the document until a considerable time after employment by Anita. Their signed bond applications, which were executed between May

to carry approximately 10 percent of its inventory in children's clothing as had Tanne-Arden).

2. Changed

Anita sought to change the market emphasis of the store by changing the type of women's apparel from a line designed to attract the "junior" woman to a line designed to attract the "mature" woman. In pursuit of that change of emphasis, Anita dropped half sizes and large sizes (which constituted approximately 30 percent of the inventory it found upon taking over the store); phased out foundation garments and lingerie items; marked down the Tanne-Arden inventory to sell it off as quickly as possible, and stocked the store with the Anita line.

Anita also changed practices and procedures at the store to conform with the uniform practices and procedures of the Anita chain. To accomplish this, Anita instituted the use of sales slips and merchandise tags, which were not utilized by the former owner; over a period of time following the takeover, Anita sought to man the store with more part-time and fewer full-time employees and to compensate sales employees with both salaries and commissions (the employees were mostly full time and on straight salary under the previous owner); Anita changed policies regarding merchandise exchanges, refunds, and customer credit (Anita did not extend credit, as the former owner had); and Anita changed accounting methods, report requirements, display techniques, rack locations, and markdown procedures to conform with its uniform practices at other stores.

E. Union Recognition, Dispute Over New Wage Rates, etc.

As noted heretofore, on May 26 Anita sent and on May 30 the Union received a letter wherein Anita stated it was retaining Tanne-Arden's nonsupervisory employees at store 127, recognized the Union as their exclusive representative for collective-bargaining purposes, and was prepared to negotiate a contract covering the wages, hours, and working conditions of those employees, but, pending the outcome of such negotiations, it was installing Anita's compensation programs, policies, and practices.

On June 16, the Union confirmed its receipt of Arden's letter, stated it desired a meeting but that it expected Anita to maintain the wages, working conditions, health, welfare, and pension benefits set out in the Tanne-Arden/Union contract and supplement, referred to heretofore, pending such meeting.

On July 5, Anita responded with an offer to meet with the Union at a mutually convenient time.

On July 13, the Union set out availability dates and informed Anita it was filing charges with the Board over the Company's unilateral reduction of wages and benefits prior to meeting.

On July 14, the Union filed the charges which led to this proceeding.

⁸ *Barrington Plaza and Tragnew, Inc.*, 185 NLRB 962, 964, and cases cited herein.

⁹ The record discloses there were five employees in the unit on or about May 30 and seven by the time of hearing; the record does not disclose

On July 17, Anita advised the Union it would meet with it on one of the availability dates set out by the Union. The parties met subsequently but did not reach agreement on contract terms.

The changed and lower rates of pay, hours, and working conditions placed in effect by Anita on May 30 have continued since that date, except as further changed by Anita since then.

F. Analysis and Conclusions

1. Unit and union majority

The Union was certified in 1960, and was subsequently contract-recognized by Tanne-Arden through August 31, 1973, as the exclusive collective-bargaining representative of all Tanne-Arden employees at store 27, excluding guards, watchmen, and supervisors, as the latter terms are defined in the Act.

The services of the employees in the above unit were not interrupted by the change in ownership from Tanne-Arden to Anita—the last day they worked for Tanne-Arden was Saturday, May 27; the store was closed on Sunday, May 28, and Monday, May 29 (for the Memorial Day Holiday); when the store reopened on Tuesday, May 30, the unit employees worked for Anita as they reported for work thereafter on their regular schedules.

When a contract provision is in existence which provides that an employer recognizes a union as the exclusive collective-bargaining representative of his employees within an appropriate unit and a new owner continues the same work force in his employ, a presumption arises that the union's majority representative status within the unit continues unchanged, unless rebutted by substantial evidence.⁸ In view of its carryover of all unit employees on May 30, Anita recognized the Union as the exclusive representative of its employees within the unit upon its purchase of store 127 from Tanne-Arden and made no effort to rebut the foregoing presumption.

I therefore find and conclude that a unit consisting of all of Anita's employees at store 127, excluding guards, watchmen, and supervisors, as the latter terms are defined in the Act, is an appropriate unit for collective-bargaining purposes under Section 9 of the Act, and that at all times since May 30 the Union has represented a majority of Anita's employees within that unit.⁹

As noted above, there was no interruption in the employment of the unit employees. They continued in the same jobs, performing the same duties under Anita as under Tanne-Arden. There were only minor changes in their duties to conform to new procedures (use of sales slips, merchandise tags, etc.). There was no change in store location, name, or the use of the racks, hangers, garment bags, cash register, etc., utilized by Tanne-Arden. Neither was there a change in the basic character of the business—the retail sale of women's apparel and children's clothing. No change at all occurred in the latter category,

whether the extension resulted from increased buying volume, reduction of hours of full-time employees and addition of part timers to implement its chainwide policy of relying primarily on part-time employees, or other causes.

and the change in the former was limited to a change in the type and style of women's apparel carried by the store.

I therefore find and conclude that the "employing industry" remained unchanged and unaffected by the change in ownership, and that Anita was a successor employer to Tanne-Arden, as that term has been defined and applied in cases arising under Section 8(a)(5) and (1) of the Act.

3. Anita's obligations as a successor employer

The General Counsel and the Union contend that Anita was obligated, as a successor employer, to recognize the Union as the exclusive collective-bargaining representative of its employees at store 127 within the unit covered by the Tanne-Arden/Union contract, to consult with the Union concerning the rates of pay, wages, hours, and working conditions of the unit employees and to desist from making any changes in the rates of pay, wages, hours, and working conditions of the unit employees from those prevailing on May 27 until it consulted the Union concerning any changes therein and bargained in good faith regarding its proposed changes to impasse or agreement.

While not conceding it was a successor to Tanne-Arden, Anita does not take serious issue with the contention, assuming it was a successor employer under the Act, that it had a duty to recognize and bargain with the Union concerning the rates of pay, wages, and working conditions of the unit employees since, in fact, Anita recognized the Union and bargained with it.

Anita takes the position, however, that it and any other successor employer has the right to institute such initial rates of pay, wages, hours, and working conditions as it wishes and to maintain or change them at will unless and until it reaches an agreement with the Union to any fixed rates of pay, wages, hours, or other conditions of employment.

While the Supreme Court in the *Burns* case,¹⁰ ruled that a successor employer could not be required under the Act to assume the contract of a predecessor employer, it went on to state that where "it is perfectly clear that the new employer plans to retain all of the employees in the unit . . . it will be appropriate to have him initially consult the employees' bargaining representative *before* he fixes terms." (Emphasis added). In subsequent cases, both the Board and this circuit (C.A. 9) have ruled that in situations such as that described by the Supreme Court, i.e., where a successor employer plans to and does retain the employees of his predecessor and the predecessor had a contract with a union covering those employees spelling out their rates of pay, etc., the successor employer violates Section 8(a)(5) and (1) of the Act by instituting rates of pay, etc., which differ from those established under such contract if it does so *before* consulting with the union over such changes.¹¹

The evidence clearly establishes, in this case, that prior to its commencement of operation of store 127 Anita informed the Union that it planned to retain all of Tanne-Arden's employees within the unit represented by the Union and, in fact, did so. This plan and its reality is

attested to by Anita's May 26 letter to the Union and the testimony of J. Hardcastle.

It is further clear that Anita did not intend to consult with the Union prior to instituting its lower rates of pay, wages, hours, and other working conditions, since its May 16 notice of its proposed changes and offer to consult was so timed as to make it impossible for the Union to respond to the offer prior to the effectuation of the changes; the changes were made at the commencement of business on May 30; the Union received the offer to consult by regular mail at ordinary mail delivery time that same day.

4. Waiver or estoppel

Anita seeks to resist the conclusion normally flowing from the foregoing by contending estoppel or waiver to protest the changes on the grounds the unit employees accepted the new wage scales on May 30 and 31 when informed of them upon reporting for work and the Union's failure to respond to its consultation offer until June 16.

Anita directed an ultimatum to the employees upon their initial reporting for service, i.e., to either "take or leave" the rates of pay, wages, hours, and other working conditions it decided upon. Employee acceptance of employment under these conditions hardly constitutes a waiver of their and the Union's right under the Act to protest Anita's failure to consult with the Union prior to their institution, or estop them from protesting. By recognizing, in its May 26 letter, that the Union was the majority collective-bargaining representative of the employees in question, the Company obligated itself to consult with the Union and not with the employees concerning their rates of pay, etc., prior to making changes therein.

Nor does the Union's June 16 reply to the Company's announcement of its unilateral program constitute a waiver or estoppel. Anita prevented any consultation prior to institution of the changes by placing the changes in effect *prior* to delivery of its offer to consult with the Union about them; Anita itself made it impossible for the Union to insist on retention of the existing rates of pay, etc., pending consultation with Anita concerning its changes therein. Thus, the fact the Union's protest came 2 weeks later is irrelevant.

Based upon the foregoing, I find and conclude that, by its May 30 unilateral establishment of rates of pay, wages, hours, and working conditions for the unit employees, which differed from the rates of pay, wages, hours, and working conditions of its predecessor, Tanne-Arden, without affording the Union an opportunity to consult with it concerning the changes therein, prior to their institution, Anita violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. At all times material, Anita was an employer engaged in commerce in a business affecting commerce

¹⁰ *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

¹¹ *Good Foods Manufacturing and Processing Corp.*, 200 NLRB No. 86;

Howard Johnson Co., 198 NLRB No. 98; *N.L.R.B. v. Denham Co.*, 469 F.2d 239 (C.A. 9, 1972).

and the Union was a labor organization as those terms are defined in Section 2(2), (5), (6), and (7) of the Act.

2. At all times pertinent, a unit consisting of all regular full-time and regular part-time employees employed at the store located at 57 South First Street, San Jose, California, excluding guards, watchmen, and supervisors as those terms are defined in the Act, constituted an appropriate unit for collective-bargaining purposes within the meaning of Section 9 of the Act.

3. At all times pertinent, the Union has been the duly designated collective-bargaining representative of a majority of the employees within that unit.

4. For purposes of the Act, at times pertinent, Anita was a successor employer to Tanne-Arden with respect to the store and employees located at 57 South First Street, San Jose, California.

5. By its May 30 changes in the rates of pay, wages, hours, and other working conditions of the unit employees from those prevailing immediately prior thereto, without prior consultation with the Union concerning such changes, Anita violated Section 8(a)(5) and (1) of the Act.

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

THE REMEDY

It having been found that Anita has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that Anita be directed to cease and

desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

In order to make the unit employees whole for the losses they suffered by reason of Anita's unfair labor practices, I shall recommend that Anita be directed to restore to the unit employees the rates of pay, wages, hours, and other benefits they received immediately prior to Anita's May 30 changes therein. I shall further recommend that Anita be ordered to make the unit employees whole for any wage or benefit losses which they have suffered by virtue of Anita's May 30 changes therein, for a period commencing May 30 and extending to the date the rates of pay and other benefits are restored to their prior levels, together with interest thereon at the rate of 6 percent per annum. I shall also recommend that Anita be ordered to continue in effect the rates of pay, wages, hours, and other benefits and working conditions in existence immediately prior to May 30 until such time as Anita has negotiated in good faith with the Union to agreement or to impasse.

Finally, inasmuch as Anita has recognized the Union and offered to negotiate and negotiated with it concerning the rates of pay, wages, hours, and working conditions of the unit employees, and to effectuate the purposes of the Act, I shall recommend that Anita be directed to continue to recognize the Union and to continue to bargain with the Union at its request concerning the rates of pay, wages, hours, and working conditions of the unit employees until such time as agreement or impasse is reached.

[Recommended Order omitted from publication.]