and (2) of the Act, I shall recommend that the Respondent notify Pacific and Engineers, in writing, and serve a copy upon Sands, that the Respondent has no objection to Sands' employment by Pacific and Engineers individually or in their capacity as a joint venture. It is further recommended that the Respondent make Sands whole for any loss of pay he may have suffered as a result of the discrimination against him. The amount of backpay in each case shall be computed and paid in accordance with the Board's *Woolworth* formula. *F. W. Woolworth Company*, 90 NLRB 289. Respondent's backpay liability will terminate 5 days after notification of Pacific and Engineers that it has no objection to Sands' employment.

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. Pacific and Engineers, individually and as a joint venture, are employers within the meaning of Section 2(2) of the Act.
2. Pipeline Contractors Association, engaged in collective bargaining for, and the negotiation of collective-bargaining agreements on behalf of, its members, including Pacific and Engineers, is an employer within the meaning of Section 2(2) of the Act.
3. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
4. By causing the Employer herein to discharge its employee, Lloyd D. Sands, in violation of Section 8(a)(3) of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

Howard Johnson, Inc., of New Jersey and Howard Johnson Company *and* Hotel and Restaurant Employees and Bartenders Union, Local 4, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO. *Case No. 22-CA-977. February 26, 1962*

DECISION AND ORDER

On December 8, 1961, Trial Examiner Sidney Lindner issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Fanning, and Brown].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Howard Johnson Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Hotel and Restaurant Employees and Bartenders Union, Local 4, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO, as the exclusive bargaining representative of employees in the appropriate unit with respect to wages, rates of pay, hours of employment, or other conditions of employment. The appropriate collective-bargaining unit is:

> All waiters, waitresses, cashiers, counter employees, cooks, porters, kitchen help, and gift shop employees at the Employer's Milltown Restaurant 8N, excluding office clerical employees, hostesses, guards, professional employees, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Bargain collectively, upon request, with Hotel and Restaurant Employees and Bartenders Union, Local 4, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO, as the exclusive representative of all employees in the aforesaid appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Milltown Restaurant 8N copies of the notice attached hereto marked "Appendix."[1] Copies of said notice, to be furnished by the Regional Director for the Twenty-second region, shall, after being duly signed by a representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places

[1] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Twenty-second Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL bargain collectively on request with Hotel and Restaurant Employees and Bartenders Union, Local 4, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO, as the exclusive representative of all our employees in the following appropriate collective-bargaining unit, and, if an understanding is reached, we will embody such understanding in a signed agreement. The appropriate collective-bargaining unit is:

> All waiters, waitresses, cashiers, counter employees, cooks, porters, kitchen help, and gift shop employees at our Milltown Restaurant 8N, excluding office clerical employees, hostesses, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Hotel and Restaurant Employees and Bartenders Union, Local 4, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as authorized in Section 8(a)(3) of the Act.

HOWARD JOHNSON COMPANY,
Employer.

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 614 National Newark Building, 744 Broad Street, Newark 2, N.J., Tel. No.: MArket 4–6151, if they have any question concerning this notice or compliance with its provisions.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon a charge and amended charge, duly filed by Hotel and Restaurant Employees and Bartenders Union, Local 4, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO, herein called the Union, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for the Twenty-second Region (Newark, New Jersey), issued a complaint dated September 8, 1961, against Howard Johnson, Inc , of New Jersey [1] and Howard Johnson Company, herein called Respondents, alleging that Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136 and 73 Stat. 519, herein called the Act. Copies of the complaint and notice of hearing were duly served upon Respondents, in response to which Respondents filed separate answers denying the unfair labor practices alleged.

A hearing was held on October 11 and 12, 1961, at Newark, New Jersey, before the duly designated Trial Examiner. All parties were represented by counsel at the hearing and were given full opportunity to examine and cross-examine witnesses and to introduce evidence bearing on the issues; they were also given opportunity for oral argument at the close of the hearing and to file briefs and proposed findings and conclusions of law. Briefs have been received and have been duly considered. Upon the entire record in the case and upon observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENTS

Howard Johnson, Inc., of New Jersey, referred to variously as Respondent and New Jersey Corporation, was incorporated in the State of New Jersey on October 26, 1951. On June 30, 1961, the corporation filed with the office of the Secretary of State of the State of New Jersey, a duly executed and attested consent in writing to the dissolution of said corporation and a certificate of dissolution of Howard Johnson, Inc., of New Jersey was thereupon issued.

Howard Johnson, Inc., of New Jersey during its corporate existence operated a chain of restaurants in the State of New Jersey, including, among others, Restaurant 8N on the New Jersey Turnpike, located near the city of Milltown, State of New Jersey, the only restaurant we are concerned with in this proceeding, where it sold and distributed food, beverages, and other related products to the general public. During the year ending June 30, 1961, the New Jersey Corporation in the course and conduct of its business operations received gross annual revenue in excess of $500,000. During the same period it purchased and caused to be delivered to its Milltown Restaurant 8N, food and materials of a value in excess of $50,000 from States of the United States other than the State of New Jersey.

Howard Johnson Company, a Maryland corporation herein referred to variously as the Respondent and the Maryland Corporation, was organized under and exists by virtue of the laws of the State of Maryland. It was incorporated on March 9, 1961. Upon the dissolution of the New Jersey Corporation on June 30, 1961, Milltown Restaurant 8N continued to be operated without break in time by the Maryland Corporation.[2] Since June 30, 1961, the Maryland Corporation in the course and

[1] The correct name as amended at the hearing, on motion of the General Counsel

[2] In 1951 the New Jersey Turnpike Authority entered into an agreement providing for operation of Turnpike restaurants with Howard D Johnson Company, a Massachusetts corporation, owned and controlled by Howard D. Johnson, his son Howard B. Johnson, and his daughter Dorothy Weeks, whereby the Massachusetts corporation was given the right to operate the 14 restaurants, including Milltown Restaurant 8N, all located on the New Jersey Turnpike The agreement contains an assignability clause, which although it requires prior written permission from the Authority for assignment, precludes un-

conduct of its business operations received gross revenue in excess of $500,000. Its purchases for Milltown Restaurant 8N from June 1961 to September 1961 from States of the United States other than the State of New Jersey exceed $8,000 and on a projected basis to June 30, 1962, will exceed $50,000. It was stipulated at the hearing and I find that for the period April 1961 to June 30, 1961, Howard Johnson, Inc., of New Jersey was engaged in commerce within the meaning of the Act, and Howard Johnson Company, the Maryland Corporation, was likewise engaged in commerce within the meaning of the Act for the period June 30, 1961, to the date of the hearing herein.

II. THE LABOR ORGANIZATION INVOLVED

Hotel and Restaurant Employees and Bartenders Union, Local 4, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO, is a labor organization admitting to membership employees of the Respondents.

III. THE UNFAIR LABOR PRACTICES

A. *The corporate structures of Howard Johnson, Inc., of New Jersey and Howard Johnson Company, a Maryland corporation; the transfer of assets; and the identity of operation and control of the Respondents*

The New Jersey Corporation was incorporated on October 26, 1951. There was a total of 100 outstanding shares of stock in the New Jersey Corporation owned as follows: Howard D. Johnson (father), 33 shares; Howard B. Johnson (son), 33 shares; Dorothy Weeks (daughter), 33 shares; and 1 share was owned by an unnamed secretary.

On March 10, 1961, Howard Johnson Company was organized as a Maryland corporation.

On May 16, 1961, Howard D. Johnson, Howard B. Johnson, and Dorothy Weeks transferred all of the outstanding stock of 39 corporations, of which they were the sole owners, included among which was the New Jersey Corporation, in exchange for all of the then outstanding shares of common stock and common stock B (2,200,000) of the Maryland Corporation.

On May 18, there was offered to the public via designated underwriters 660,000 shares of common stock, representing 30 percent of the outstanding voting stock of the Maryland Corporation. Upon completion of the public offering the Johnsons and Weeks owned 1,400,000 shares of common stock B and 140,000 shares of common stock which together represent 70 percent of the outstanding voting stock of the Maryland Corporation.

The directors and executive officers of the newly organized Maryland Corporation are Howard D. Johnson, chairman of the board, treasurer, and director; Howard B. Johnson, president and director; Eugene Durgin, vice president and secretary; [3] John Wyllie, vice president and treasurer; [4] Merle Perkins, controller; [5] and Directors Charles Enders, Walter Giblin, and William Martin.[6] In addition the Maryland Corporation set up an executive management committee for the purpose, among other things, of determining long range operating polices. The chairman of the committee is Howard B. Johnson and there are five former officers of various Johnson subsidiaries as well as Durgin and Wyllie included in its membership.

On June 19, 1961, the sole stockholder of the New Jersey Corporation, namely the Maryland Corporation, by resolution approved a plan whereby the New Jersey Corporation would be completely liquidated by transferring all its assets subject to

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reasonable denial of granting permission to assign to a New Jersey corporation to be organized by the operator, or to Howard D Johnson individually. In either event the assignee must be a wholly owned subsidiary under the Massachusetts corporation's regular management or by Howard D. Johnson individually By an instrument of transfer dated June 30, 1961, signed by Howard D Johnson, Howard B Johnson, and Dorothy Weeks, the operation of the Turnpike restaurants was assigned to the Maryland Corporation

[3] Durgin had been since 1956 general counsel and vice president of many of the Johnson corporations and its subsidiaries He was vice president and secretary of the New Jersey Corporation.

[4] Wyllie had been the principal accounting officer of most of the Johnson subsidiaries since 1951.

[5] Perkins since 1959 has been controller of most of the Johnson subsidiaries.

[6] These three directors did not have any prior affiliation with the Johnson corporations or its subsidiaries.

its liabilities to the Maryland Corporation. The said resolution was approved June 21, 1961.

On June 30, 1961, as heretofore noted, a certificate of dissolution of the New Jersey Corporation was issued by the Secretary of State of the State of New Jersey. On the same date, the trustees in dissolution of the New Jersey Corporation transferred its assets subject to its obligations and liabilities to the Maryland Corporation in accordance with an "Instrument of Transfer" executed by the Johnsons and Weeks as trustees in dissolution of the New Jersey Corporation.

Upon the dissolution of the New Jersey Corporation on June 30, 1961, the Maryland Corporation continued to operate Milltown Restaurant 8N without any break in time. There was no closing of Milltown Restaurant 8N for alterations or for any other reason.

Several witnesses called by the General Counsel who were employees at Milltown Restaurant 8N before and after June 30, 1961, testified without contradiction that there has not been any change in the basic operations of Milltown Restaurant 8N during the entire period of their employment. It is contained in the same building; it has the same furnishings; the sign on the outside of the building is the same; the assignments and scheduling of waitresses and counter girls is the same; their uniforms are the same; the menus and the food served is the same; with the exception of a hostess and manager the supervisory staff is the same; the same suppliers continue to supply Milltown Restaurant 8N; the packaging of food is the same; and the ice cream flavors are the same. It was also stipulated at the hearing that the signature "Howard D. Johnson" authorized to sign checks appeared on employees' payroll checks before and after June 30, 1961.

B. *The refusal to bargain*

On February 24, 1961, the New Jersey Corporation and the Union entered into an agreement for consent election approved by the Regional Director for the Twenty-second Region, which provided for an election to be conducted by the Board on March 7, 1961, among the employees in Milltown Restaurant 8N in the following appropriate collective-bargaining unit:

> All waiters, waitresses, cashiers, counter employees, cooks, porters, kitchen help, and gift shop employees at Employer's Milltown, New Jersey (New Jersey Turnpike 8N) Restaurant but excluding all office clerical employees, hostesses, guards, professional employees, and supervisors as defined in the Act.

The tally of ballots cast in the election revealed that of approximately 48 eligible voters, 30 votes were cast for the Union, 14 votes were against the Union, and there were 2 challenged ballots.

On April 11, the Regional Director for the Twenty-second Region after investigation found the New Jersey Corporation's objections to conduct affecting the results of the election lacking merit, overruled them in their entirety, and certified the Union as the exclusive representative of the employees in the above-described appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

On May 8 and 23 and June 13, representatives of the Union met with the New Jersey Corporation's representatives. The Union submitted a typewritten statement of its demands at the first meeting and the parties thereafter discussed various aspects of wages, hours, and working conditions.

It was stipulated at the hearing that at the June 13 negotiation meeting, the Employer's representatives, Attorneys Rufus McDonald and Daniel Steele,[7] John Hipson, presently a vice president of the Maryland Corporation and a member of its executive management committee, but who was at the time of the June 13 meeting vice president of Howard Johnson, Inc., of New York, a director of two or three other Howard Johnson subsidiaries, and overseer of the New Jersey Corporation's activities, and Mr. Cauldon, head supervisor of the New Jersey Corporation's Turnpike operation, agreed to make a study of the Union's proposed wage schedule and statistics attached thereto and present its conclusions to the Union at the following negotiation session.

[7] Steele also attended the May 23 meeting. He testified that since May 8, 1961, he has been employed by the Maryland Corporation as its labor relations director and labor counsel on a full-time basis. For 16 years prior he acted as labor consultant for the Howard Johnson corporations and subsidiaries. He stated he attended the negotiation meetings with the Union as the representative of Howard D. Johnson, president and treasurer of the New Jersey Corporation.

On July 6, the union representatives met with McDonald, Steele, Hipson, and Cauldon. At the outset Hipson and Steele told the union representatives that the New Jersey Corporation had been liquidated and they therefore were unable to continue negotiations on behalf of that corporation.[8]

Arnold Cohen, attorney for the Union, then said that a change in name or in the corporate structure did not mean anything, and he hoped they would continue to negotiate. He asked that he be advised within a week or 10 days regarding the continuation of the negotiations. Hipson and Steele said they did not have authority from the Maryland Corporation to enter into negotiations and therefore could not commit themselves to further bargaining sessions.

Steele admitted that at the July 6 session he said he would contact the Maryland Corporation regarding the Union's request to bargain. He qualified such admission with the explanation that he was asked by a union representative if he would inquire from the Maryland Corporation whether it would "recognize them as a successor in the matter of negotiations, collective bargaining."

Steele testified he did not contact the Maryland Corporation as promised, because he was otherwise engaged until July 14 on some union matters away from his office, and since shortly thereafter the Maryland Corporation was notified by the Board of the Union's charge alleging unfair labor practices, "it negated any further compulsion or requirement or obligation to notify or recognize Local No. 4." When advised by the Trial Examiner that the filing of the charge did not preclude further collective bargaining, Steele acknowledged that this was correct, but stated in the meantime it had come to his attention that the Maryland Corporation was not a successor employer. No further meetings or bargaining sessions have been held since July 6.

C. *Contentions and conclusions*

It is the General Counsel's contention raised at the hearing and as set forth in his brief that the Maryland Corporation is a successor to the New Jersey Corporation and bound to recognize and bargain with the Union under the Board certification and that both Respondents bargained in bad faith, all in violation of Section 8(a)(5) of the Act.

Since a request to bargain is an essential element and a condition precedent to an employer's duty to bargain, we will deal first with this contention raised by Respondent Maryland Corporation. It is settled law that a request for recognition or to bargain need not follow a prescribed form so long as it is clear from the entire situation that all essential elements of a valid demand are present.[9] I have heretofore found that when the parties met on July 6 and the Union was advised by Hipson and Steele that they did not have authority from the Maryland Corporation to enter into negotiations and therefore could not commit themselves to further negotiation sessions, the Union's attorney noted that a change in name or in corporate structure did not mean anything and requested that he be advised within a week or 10 days if the negotiations started by the New Jersey Corporation would continue. In the light of the relationship between Hipson, then a member of the Maryland Corporation's executive management committee, which was setting policy for the new corporation, and Steele, its labor counsel, I am convinced that they must have known from Cohen's remarks that he, on behalf of the Union, was requesting the Maryland Corporation to bargain. Indeed, Steele admitted that he would contact the Maryland Corporation regarding the Union's request to bargain. Need the request to be more specific be made to one other than the labor counsel? I think not. In *Norwich Dairy Company, Inc., et al.*, 25 NLRB 1166, 1183, the Board held that a demand on a president of a predecessor corporation who became president of a new corporation which conducted the same business in the same plant with the same personnel was a continuing demand to the new corporation. I am convinced and find from the above and the whole record that on July 6 Respondent Maryland Corporation was aware that the Union was requesting it to bargain and continue negotiations, and it therefore follows that its contention that there was no specific request of it to bargain is without merit or substance.

We turn next to a resolution of the basic question herein, whether Respondent Maryland Corporation is a successor employer to the New Jersey Corporation and is therefore under a duty to bargain collectively, within the certification year, with the Union as the duly certified representative of the employees in the appropriate

[8] It was stipulated at the hearing that at no time during the prior negotiation meetings did the New Jersey Corporation representatives mention the status of the legal entity of the Maryland Corporation

[9] *Colony Materials, Inc.*, 130 NLRB 105; *N.L.R.B. v. Barney's Supercenter, Inc.*, 296 F. 2d 91 (C.A. 3).

unit. The theory of successorship is that the new operator of the business falls heir to the responsibilities and liabilities, if not privileges, of the original employer that stem from the certification. The fundamental approach and test is whether the "employing industry" remains essentially the same in terms of such factors as location, equipment, personnel, and mode of operation. It has been firmly established by a long line of Board decisions sustained and enforced by courts of appeals that where the "employing industry" remains essentially the same after a transfer of legal ownership the certification continues for its normal operative period.[10] The Board in *Cruse Motors, Inc.*, 105 NLRB 242 at 247, stated,

> A mere change in ownership of the employment enterprise is not so unusual a circumstance as to affect the certification. Where the enterprise remains substantially the same, the obligation to bargain of a prior employer devolves upon his successor in title. A purchaser in such a situation is a successor employer. . . .

Indeed, no contention is made herein that the "employing industry" was not the same after June 30, when the Maryland Corporation took over the operation of Milltown Restaurant 8N and continued to operate it without break in time.[11]

I find based on the uncontradicted testimony of the employee witnesses set forth above, and on Hipson's testimony that "there was no change as far as the girls and the restaurant is concerned," that Respondent Maryland Corporation took over Milltown Restaurant 8N on July 1 and continued to operate it without break in time as a restaurant, the "employing industry."

But, contends Respondent Maryland Corporation, "we are a 'publicly owned' corporation" as distinguished from the "family owned" New Jersey Corporation with complete distinction of the membership, duties, responsibilities, and obligations of the directors and such factors alone are sufficient to establish that we are not a successor employer. It contends further that the Maryland Corporation is comprised of a five-member Board, distinct in identity, the majority of whom had no affiliation with the New Jersey Corporation and in whom are vested all power of control and management. As found hereinabove, however, after the public offering of the Maryland Corporation stock, the Johnson family retained 70 percent of its stock and thereby retained its control of the Maryland Corporation. Moreover, the prospectus of the Maryland Corporation, upon which Respondent relies in its brief, also discloses that the Johnson family[12] "immediately after sale of the shares offered [hereby] will own all of the outstanding Common Stock B and will be in control of the Company[13] . . . through exercise of such control in the election of directors."

While it is true as Respondent points out in its brief that the board of directors is comprised of five members, the majority of whom had no affiliation with the New Jersey Corporation, the record does not bear out its contention that all power of control and management is vested in the board of directors. I have hereinabove dealt with control. So far as management is concerned, the prospectus reveals that it will be handled by a group of eight, which includes executive officers as well as the five-man board of directors. Howard D. Johnson, in addition to his director's duties, is chairman of the board and treasurer, Howard B. Johnson is president as well as director. The other executive officers and the executive management committee which was set up to determine operating policies is composed solely of former officials of the Johnson Corporations and its subsidiaries. Thus it appears clear that the Johnson family by its ownership of 70 percent of the voting stock will not only retain control of the Maryland Corporation, but by their positions as directors and executive officers and chairman of the executive management committee will continue to manage and direct operation of the Maryland Corporation. To recognize and give effect to Respondent's argument that because 30 percent of its outstanding common stock is publicly owned it therefore is not a successor employer, would imply that

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[10] *N L R B.* v. *Lunder Shoe Corp , d/b/a Bruce Shoe Corp ,* 211 F. 2d 284 (C A. 1) ; *N.L R B* v. *Albert Armato, et al ,* 199 F. 2d 800 (C A. 7) ; *N L R B.* v *Thomas Parran, Jr , t/a Silver Spring Transit Company and/or Suburban Transit Company,* 237 F. 2d 373 (C A 4) ; *N L R.B* v *Blair Quarries, Inc ,* 152 F. 2d 25 (C A. 6) ; *F G McFarland, et al , d/b/a McFarland & Hullinger,* 131 NLRB 1068 ; *Colony Materials, Inc.,* 130 NLRB 105 ; *Firchau Logging Company, Inc ,* 126 NLRB 1215 ; *Ugite Gas Incorporated,* 126 NLRB 494 ; *Investment Building Cafeteria,* 120 NLRB 38

[11] All restaurants on the New Jersey Turnpike in accordance with the agreement between the New Jersey Turnpike Authority and the operator must remain open 24 hours a day

[12] Referred to in the prospectus as the selling stockholders.

[13] Company is referred to in the prospectus as the Howard Johnson Company, the Maryland Corporation.

the Board should not apply the Act and its precedents to corporations like General Motors, General Electric, United States Steel, and Columbia Broadcasting System.[14] I do not accept this argument.

Another contention raised in its brief is that there was no proof adduced that Respondent Maryland Corporation assumed any obligation as to the Board's certification running to certain classifications of employees of the New Jersey Corporation, therefore it is not a successor liable under the certification against the seller. There is no merit to this contention. The short answer is that even if Respondent Maryland Corporation specifically provided by contract that it did not assume the Board certification obligations of the New Jersey Corporation, it could not insulate itself from the Board's certification, for it is well established that private parties may not by contract void an obligation imposed by a Federal law.[15]

I find from all of the above and the whole record that Respondent Maryland Corporation is the successor employer to the New Jersey Corporation. In *Barker Automation, Inc., et al.,* 132 NLRB 794, a New York Corporation, a subsidiary of the Waterman Pen Company, Ltd., Montreal, Canada, purchased the assets of the Barker Companies and 30 percent of the purchase price was payable in Waterman Pen Company stock. This stock is also publicly owned. Following the sale, the corporate organizations of the Barker Companies were dissolved. The purchasing company moved to dismiss the petition asserting as grounds that the companies after being sold in a bona fide transaction were dissolved, were no longer in existence, and that since the sale, the operation of the plants involved had so changed that the units described in the Board's decision no longer existed. The Board, denying the motion, stated, "Where, after a Direction of Election has been issued, the business involved is sold, but there is no change in any essential attribute of the employment relationship, the direction is to be construed as providing for an election among the employees of the successor."

Another contention raised by Respondent Maryland Corporation in its brief is that the appropriate unit certified by the Board has been drastically altered and the percentages show that it no longer consists of "substantially the same employees" as alleged in the complaint, therefore the purchaser of a business is not required to deal with a certified union where the former employees constitute a minority of present employees of the merged operations. Respondent further notes in its brief that the number of employees in the unit after it took over increased to 76 and only 34 or 44 percent of the original eligible voters were in the unit on July 2, and on October 8 there were 27 or 46.5 percent of the original eligible voters out of a unit then comprising 58. I find no merit in this contention. The changes noted by Respondent do not impress me as other than minor, particularly since we are dealing here with the restaurant industry notorious for its turnover and for its seasonal employment. Even in cases where the changes of personnel in the unit have been larger, the Board has found that this was not an impediment to the certification carrying over to the new employer. In *Royal Brand Cutlery Company, a Division of Brockelman Brothers Inc.*, 122 NLRB 901, the Board ordered a successor employer to bargain with a certified union for the employees in an appropriate bargaining unit where an entire warehouse department of 55 employees was retained by the predecessor employer. The Court of Appeals for the Seventh Circuit, dealing with the problem of turnover in personnel in *N.L.R.B.* v. *Armato, supra,* enforced the Board's order to bargain against a successor company where its work force had increased during the time it took over the operation, so that at the time of the refusal to bargain it was composed of 8 employees who were in the original appropriate bargaining unit and 17 newcomers. In its opinion the court stated:

> The very nature of a certification of a union as bargaining agent for a group of employees impels the conclusion that a mere change in employers does not operate to destroy the effectiveness of the certification. It is an official pronouncement by the Board that a majority of the employees in a given work unit desire that a particular organization represents them in their dealings with their employer. There is no reason to believe that the employees will change their attitude merely because the identity of their employer has changed.

Furthermore, the Supreme Court in *Ray Brooks* v *N.L.R.B.*, 348 U.S. 96, held that an employer must, absent unusual circumstances,[16] honor a Board certification for a reasonable period, ordinarily 1 year.

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[14] Involved in cases where the Board asserted jurisdiction

[15] *J. I. Case Company* v. *N.L.R.B.*, 321 U.S. 332; *National Licorice Company* v. *N.L.R.B.*, 309 U.S. 350.

[16] I do not find the unusual circumstances set forth in the Court's opinion present in the instant case.

Finally, Respondent Maryland Corporation contends in its brief that since the New Jersey Turnpike Authority being a body corporate and politic established pursuant to chapter 545 of the New Jersey laws of 1948 and under Section 2(2) of the Act specifically exempted from the Board's jurisdiction as a political subdivision of the State, and since it is engaged in the execution of the Authority's functions and is "an integral part" of the Authority, it is the "alter ego" and likewise is entitled legally and equitably to the exemption afforded a political subdivision of the State.

As I interpret the record, particularly the agreement providing for operation of Turnpike restaurants, the status of Respondent Maryland Corporation as the successor of the New Jersey Corporation is that of an Authority contractor and not that of an agent of the Authority. Furthermore, the restaurant employees are hired and fired and paid by the Respondent Maryland Corporation and under its direction, control, and supervision, unlike the employees (toll collectors) directly employed by the Authority in the *New Jersey Turnpike Authority* case, 33 LRRM 1528, cited in the brief. In this regard it is interesting to note that the Board has asserted jurisdiction in cases involving employees of restaurants on the Indiana Toll Road, see *Interstate Co., Glass House Restaurants, Indiana Toll Road,* 125 NLRB 101, and the West Virginia Turnpike, see *The Interstate Company,* 118 NLRB 476.[17] I find no merit in this contention.

Accordingly, I find from the foregoing and the record as a whole that the Respondent Maryland Corporation by refusing to bargain with the Union, on and after July 6, 1961, has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act, and by such conduct has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act within the meaning of Section 8(a)(1) thereof.

Assuming *arguendo* that the failure of Respondent New Jersey Corporation to notify the Union of its pending dissolution and the organization of the Maryland Corporation, while going through the motions of bargaining, is bad faith as alleged in the complaint, it would serve no useful purpose to make a finding with respect thereto or to prescribe a remedy therefor. As hereinabove found the New Jersey Corporation was completely and legally dissolved and has disposed of all of its assets to the Maryland Corporation. The violations herein found can effectively and best be remedied by ordering Respondent Maryland Corporation to bargain collectively with the Union at its request and with respect to wages, hours, and working conditions and, if an understanding is reached, embody such understanding in a signed agreement. It is my opinion that the purpose of the Act will thereby be sufficiently effectuated.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent Maryland Corporation set forth in section III, above, occurring in connection with its business operations described in section I, above, 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 thereof.

V. THE REMEDY

Having found that Respondent Maryland Corporation has engaged in unfair labor practices, I will recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondent Maryland Corporation has refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit. I shall therefore recommend that Respondent Maryland Corporation, upon request, bargain collectively with the Union as such representative and in the event an understanding is reached, embody such understanding in a signed agreement.

It will also be recommended that Respondent cease and desist from in any like or related manner infringing upon the rights of employees guaranteed in Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case the Trial Examiner makes the following:

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[17] The Indiana Toll Road Commission and the West Virginia Turnpike Commission like the New Jersey Turnpike Authority were established by act of legislature. See Indiana Statutes, sections 36–3202, 36–3203; and West Virginia Code of 1955, article 16A—sections 1659(1)(3).

CONCLUSIONS OF LAW

1. Hotel and Restaurant Employees and Bartenders Union, Local 4, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
2. Howard Johnson Company is an employer within the meaning of Section 2(2) of the Act.
3. All waiters, waitresses, cashiers, counter employees, cooks, porters, kitchen help, and gift shop employees employed at Respondent Maryland Corporation's Milltown, New Jersey (New Jersey Turnpike 8N), restaurant but excluding all office clerical employees, hostesses, guards, professional employees, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. The above-named labor organization was on April 11, 1961, and at all times since has been the exclusive collective-bargaining representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. Respondent Howard Johnson Company from July 6, 1961, and at all times thereafter, by refusing to bargain collectively with the aforesaid labor organization as the exclusive collective-bargaining representative of all employees in the appropriate unit, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
6. By the aforesaid refusal to bargain, Respondent Howard Johnson Company has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
7. 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.]

Bonnar-Vawter, Incorporated *and* Rockland Printing Specialties & Paper Products Union, Local 643, a/w International Printing Pressmen & Assistants' Union of North America, AFL–CIO. *Case No. 1–CA–2896. February 26, 1962*

SUPPLEMENTAL DECISION AND ORDER

On September 29, 1960, the Board issued a Decision and Order in the above-entitled case, finding that the Respondent had discriminated against certain named employees in violation of Section 8(a)(1) and (3) of the Act. Thereafter, the Board's Order was enforced by the United States Court of Appeals for the First Circuit and the decree was entered on April 26, 1961. The decree provided, *inter alia*, that the Respondent make whole the employees named therein for any loss of pay suffered by reason of Respondent's discrimination against them. On August 18, 1960, the Regional Director for the First Region issued backpay specifications and on September 25, 1961, the Respondent filed an answer thereto. Upon appropriate notices issued by Regional Director, a hearing was held before Trial Examiner Phil Saunders for the purpose of determining the amounts of backpay due the claimants.

On December 8, 1961, the Trial Examiner issued his Supplemental Intermediate Report, which is attached hereto, in which he found the