

**Howard Johnson Company and International Union
of Operating Engineers, Local 68, AFL-CIO.**
Cases 22-CA-3284 and 22-CA-3317

June 28, 1968

DECISION AND ORDER

**BY CHAIRMAN McCULLOCH AND MEMBERS FANNING
AND BROWN**

On May 1, 1968, Trial Examiner George J. Bott issued his Decision 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 attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief. The General Counsel filed a brief in support of the Decision and Respondent filed a brief answering that of the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

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 Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings,¹ conclusions,² and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the Respondent, Howard Johnson Company, Englewood, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

GEORGE J. BOTT, Trial Examiner: Upon a charge

¹ These findings and conclusions are based in part, upon credibility determinations of the Trial Examiner to which Respondent has excepted. After a careful review of the record, we conclude that the Trial Examiner's credibility findings are not contrary to the clear preponderance of all relevant evidence. Accordingly, we find no basis for disturbing these findings. *Standard Dry Wall Products*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3).

² As we agree with the Trial Examiner that the Respondent was

of unfair labor practices filed by International Union of Operating Engineers, Local 68, AFL-CIO, herein called Union, in Case 22-CA-3284, on October 30, 1967, against Howard Johnson Company, herein called Company or Respondent, the General Counsel of the National Labor Relations Board issued a complaint on December 8, 1967, alleging that Respondent had engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. On December 13, 1967, the Union filed a charge in 22-CA-3317 against Respondent alleging further violations of the Act, and, on January 12, 1968, an order consolidating cases, amended complaint and notice of hearing issued adding to the allegations of the original complaint the allegations set forth in the charge in Case 22-CA-3317.

Respondent's answer and amended answer to the amended complaint admitted certain allegations but denied the commission of any unfair labor practices. A hearing was held before me at Newark, New Jersey, on February 5 and 6, 1968, at which all parties were represented. Subsequent to the hearing, General Counsel and Respondent filed briefs which I have carefully considered.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent is a Maryland corporation with its principal office and place of business in Maryland and maintains various other places of business in other States, including an ice cream manufacturing plant in Englewood, New Jersey, the only facility involved in this proceeding, where it is engaged in the manufacture, sale, and distribution of ice cream and related products.

In the course and conduct of the Englewood operation during the 12-month period prior to the issuance of the complaint, Respondent manufactured and sold products valued in excess of \$50,000, of which products valued in excess of \$50,000 were shipped from said plant in interstate commerce. Respondent concedes and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II THE LABOR ORGANIZATION INVOLVED

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

motivated by a desire to discourage union membership in depriving Koehler and Vary of wage increases, we find it unnecessary to consider the Trial Examiner's alternative finding that the Respondent's aforesaid conduct would have violated Section 8(a)(1) and (3) of the Act even in the absence of proof of such unlawful motivation.

III. THE ALLEGED UNFAIR LABOR PRACTICES

B. *The Facts*A. *Background and Issues*

There are approximately 45 employees employed at Respondent's Englewood plant but only two, Henry Koehler and Victor Vary, powerhouse engineers, are represented by a union, and the Union is their certified representative. Very briefly stated, on April 29, 1966, the Union filed a petition for an election in the unit in which Koehler and Vary work, and, after a hearing, the Regional Director, on June 9, issued a Decision and Direction of Election in the unit sought by the Petitioner. The Union won the election, and, after various proceedings and appeals, the Regional Director issued a certification of representatives on November 10, 1966. Subsequently, Respondent refused to bargain with the Union on the ground that the certification was invalid, but, after additional proceedings, the Board on May 22, 1967, held that Respondent's refusal was a violation of Section 8(a)(5) and (1) of the Act.¹ That case is presently pending enforcement in the appropriate court of appeals.

The acts alleged as unfair labor practices in this case grow directly out of the previous proceedings and the Union's certification of representatives which the Company is contesting. In short, the complaints here allege that Respondent violated the Act by warning its two operating engineers that they would not get wage increases so long as they were members of the Union or so long as the Union pressed its charges of refusal to bargain, by promising the engineers a wage increase if they withdrew from the Union; by refusing to consider them for wage increases because they were members of the Union; and by refusing to give wage increases to them when it gave wage increases to other employees who were not represented by a labor organization. It is clear that Koehler and Vary got no wage increases since 1966 when the petition for an election was filed, although practically all other employees did, and it is also clear that Respondent's failure to consider them for wage adjustments is connected with the prior representation proceeding which Respondent is contesting by refusing to bargain with the Union. Respondent denies, however, that any illegal statements or promises were made to the unit employees, and contends also that its failure to consider wage increases for Koehler and Vary while it is litigating the propriety of the Board's certification is legally justifiable.

1. Employee conversations with Christensen and Kurtz

Henry Koehler, whose testimony I credit, has been employed as an engineer at Respondent's plant since 1961. He is a member of the Union, and voted in the election which was the basis for the Union's certification. Koehler has not received a wage increase since 1966, although there is no question about his competency or the fact that the area rate for operating engineers is considerably higher than the \$3.70 an hour that Koehler makes. Koehler received regular increases in wages before he interested himself in the Union and voted in the Board election.² On August 14, 1967, Respondent installed a new chief engineer, Martin Christensen, to supervise Koehler and Vary. A few days after Christensen was hired, Koehler started conversations with him about his failure to receive a wage increase, and he testified that he raised the question about 40 times.

According to Koehler, soon after he met Christensen,³ he asked him why he had not received an increase in wages since February 1966, although others had, and Christensen agreed that he and Vary deserved higher rates and promised to speak to plant manager Burnham about it to see if he could raise them to the union scale in the area.⁴ The day after this conversation, Christensen told Koehler that he had talked with Burnham who said that the employees could not get increases because they "went for a union."

The gist of Koehler's numerous conversations with Christensen during the next few months was pretty much the same. As he met Christensen at shift change he would frequently voice his discontent, but he said that Christensen's usual response was "we can't get you no more money because you went for a union," although he conceded that the situation was not "right." On one occasion, Christensen's reaction to Koehler's continual protests was that "he was disgusted with all the talk" and would discuss the matter with Burks, Respondent's labor relations counsel. A few days later, Koehler asked Christensen if he had seen Burks, and Christensen told him that he had, and that "Burks said that the reason we can't get raises is because if they gave us a raise, they would be giving into the union and recognizing the union."

In September 1967, and again in December

¹ 164 NLRB 801

² He got a substantial increase in 1965. In early 1966, the then plant manager told him that an additional increase he was receiving was part of a "general increase" in plant wages.

³ It was stipulated that Christensen was a supervisor within the meaning of the Act.

⁴ Christensen is a former member of the Union, but sought a withdrawal card on taking employment with Respondent.

1967, most of the employees were given increases, but Koehler and Vary were not. Again Koehler voiced his displeasure, and he said that Christensen only repeated that because he and Vary had gone "for the union" the Company could not give them increases.

One of Koehler's talks with Christensen about his rate led to a conversation with Marlyn Kurtz, plant manager of Respondent's Baltimore, Maryland, operation, which is similar to the Englewood facility. Kurtz had been assigned to Englewood in October 1967 to observe conditions at the plant and to advise Burnham, the then plant manager. Koehler said that during one of his talks with Christensen he indicated that he might have made a mistake by getting involved with the Union, and he asked Christensen if he knew of any way he could withdraw from the Union and get a raise. He said that Christensen told him that there might be a way to solve the problem and get a raise because "this case might take five years in court." Sometime after this conversation, Christensen asked Koehler if he wanted to talk with Kurtz who might have some thoughts on how Koehler could withdraw from the Union and get a wage increase. Koehler indicated willingness, and the next day Christensen brought Koehler to Kurtz' office where the two talked alone.

Koehler told Kurtz that since he and Vary had not had a raise since February 1966 it looked as if the Company was holding a grudge because "we went for the union." He then repeated his conversation with Christensen about some method for the two men to resign from the Union and have their wages raised. He said that Kurtz responded that if Koehler and Vary did "get out of the union," the Company would raise Koehler to \$4.50 an hour and Vary to \$3.70. Kurtz advised Koehler to think it over, and he replied that he would talk with Vary and let Kurtz know later. He said the discussion lasted an hour, and it appears that he never gave Kurtz his decision on the subject of resignation.⁵

Victor Vary, the other engineer member of the bargaining unit, said he was promised a raise in February 1966 by the then plant manager if he obtained his engineer's license. He has gotten it, but he too has received no increases since the litigation over the unit in this case started in 1966. He also had a few conversations with Christensen about his wage problem. In September 1966, with Koehler present, he pointed out to Christensen that another employee who had no operator's license was making more an hour than he and Koehler. After some discussion, Christensen replied, according to Vary,

"you fellows went for a union, so that's why you are not going to get an increase."

Vary again complained to Christensen in October that he and Koehler had been discriminated against because they were union members. He said that Christensen told him that he would like to discuss the matter more as time went by and that he could get the two engineers more money "if we really get working together in harmony . . ." When in December 1967, other employees received length of service increases and Vary did not and complained to Christensen, Christensen said so "long as you went for the union, you are not going to get" the increase. He added under cross-examination that Christensen also said that he hoped the "union matter" would be settled "one way or the other" so that he could obtain more money for the two men.

Supervisor Christensen testified that before he was hired he had a conversation with Plant Manager Burnham in which Koehler and Vary were mentioned. He said Burnham told him that although he was a supervisor, he could not recommend changes in wage rates because there was a "union matter pending" and he could not act until it was "settled one way or the other." According to Christensen, in his admittedly numerous conversations with Koehler and Vary he merely told them that "so long as this matter was pending with the union, Local 68, I could not get them any more money until the matter was settled one way or the other." He added that this was "essentially the same" thing he said each time he talked with the men.

Christensen denied that he told the employees they could not have their wages raised because they "went for a union," but that if they got out of the Union they would get raises. He also denied telling Koehler that he could withdraw from the Union by quitting the Company's employ and then being rehired.⁶ Christensen conceded that, in addition to his basic explanation to Koehler and Vary that a union matter was pending and he could do nothing for them until it was settled "one way or the other," he also told them that he "wanted harmony in the plant" and they noted that a wage increase would "bring harmony and happiness"; that he agreed that they deserved wage increases and promised to "go to bat for them" when the "union matter was settled"; and that he did discuss the matter with Burnham and reported back to the men. He also stated that he made sure that Kurtz "was available," if Koehler wished to discuss his problem with him, and told Koehler so. He recalled that Koehler had "indicated" that perhaps it would have been

⁵ Koehler had had two earlier conversations with Kurtz about wages after Kurtz arrived at the Englewood plant to survey conditions. In the first, he merely complained about his status, and he said Kurtz replied that he would talk to him another time. In the second, Koehler complained again about being treated unfairly because of the Union, and he said that Kurtz

said that if he had been running the plant at the time there would have been no problem and Koehler and Vary would have gotten what they deserved.

⁶ Koehler had testified that this was a method for avoiding the Union suggested to him by Christensen in one of their conversations.

better if he had not joined the Union, but he said he did not recall discussing the subject with him.

Kurtz' version of his conversations with Koehler differed from Koehler's except with respect to their first meeting in early October where Koehler merely stated that he hadn't had a wage increase for some time and thought the Company was holding a grudge against him. Kurtz testified that a few weeks later Koehler visited him and, after stating that he would like to get out of the Union because it had done nothing for him, asked Kurtz if he could advise him how to do it. Kurtz merely replied that he had no experience in that area and could not tell Koehler what to do.

Sometime after this second meeting with Koehler, Kurtz told Burks about Koehler's interest in getting out of the Union and asked Burks what he might tell Koehler if he asked again. According to Kurtz, Burks told him that Koehler could write the Union and ask to be released from it, but warned him not to give Koehler any help in resigning from the Union or make any promises to him.

Kurtz testified that in December 1967, after he had talked with Burks, Koehler visited him again and this time they had a lengthy meeting during which Koehler told him again that he was unhappy and that the Union had done nothing for him. Koehler again inquired if there was some way he could rid himself of the Union and asked him what the Company would do for him if he did get out. Kurtz said he only told Koehler that he could write a letter of resignation to the Union, but that he could promise him nothing if he did.

Kurtz denied that he mentioned money in his conversation with Koehler in December or said that Koehler would be raised to \$4.50 an hour and Vary to \$3.70 if they quit the Union. He stated that Burks told him not to take the information about writing a letter to the Union back to Koehler, indicating that Koehler's visits and talks were completely his own idea, but he also stated that Christensen had discussed the Koehler situation with him and told him some of the things that Koehler later repeated to him. He agreed that he told Christensen that he would be happy to discuss matters with Koehler. Later, as described, Koehler came to him for advice, but he said he did not initiate the movement.

2. The general wage increase of September 29 and the length of service increase of December 8, 1967

A summary of Respondent's payroll records shows that practically every employee in the Company's production department employed prior to 1967 received a wage increase of 5 to 10 cents an hour during the week ending September 29, 1967. Koehler and Vary did not.⁷

Based upon a wage survey which took place after

Kurtz was assigned to Englewood to assist and advise Burham, the plant manager, Respondent adopted a new wage program, which it explained to its employees, and installed on December 8, 1967. As a result of the survey and program, a substantial number of employees received wage increases. Burnham testified that the primary factors involved in the program were the base rate (which was elevated in several cases), longevity, working conditions, and leadership qualities of the persons occupying a particular classification. The factors were assigned certain money values, and length of service resulted in an increment over the base rate of 10, 15, and 20 cents an hour for 5, 10, or 15 years of service, respectively. Records in evidence also show that although a substantial number of employees with more than 5 years of service received increases, some did not. The record also shows, however, that of the eight employees with the minimum length of service who were not raised, one, George Srill, is a salaried employee whose duties are primarily clerical in the shipping and receiving department. Five of the remaining seven are women who perform office clerical functions, and four of them, in any case, got a raise between the September 29 general increase and the December 8 increase. The fifth got a 10-cent increase on September 29. The remaining two of the eight were Koehler and Vary.

It is also a fact that five employees with less than 5 years of service got increases as a result of the survey which culminated in the December 8 wage program. Some of these employees, however, had been recently hired, and two of them did not get an increase in September 1967. Another works in the shipping department. In the light of Burnham's testimony, other factors, including a change in the base rate, may have influenced the decision to raise these employees with less than 5 years of service, but it is a fact, and I find that, in the December 8 wage review, employees comparable to Koehler and Vary with equivalent service received increases.

There can be no question that Koehler and Vary, their jobs, length of service, and personal qualifications were ignored by Respondent in determining which employees would be elevated in September and December 1967. Counsel for Respondent stated at the hearing that it was the Company's position that there would be no change in Koehler's and Vary's wages, hours, or working conditions as long as the refusal-to-bargain case remained unresolved. Burnham flatly stated in his testimony that Koehler and Vary had received no increases since 1966, and he was under specific instructions from the Company's then director of labor relations not to change their rates as long as "this case was pending before the Board." He added that Koehler

⁷ Neither did Nothorn, Oriani, and Addis, but they had been recently hired. Turner's case, who did not, is unexplained in the record.

and Vary were given no consideration for a pay increase in September 1967 because of "specific instructions that I could not." With respect to the September and December wage reviews, he stated at another point in the record that Koehler and Vary did not receive wage increases because he was "under specific instructions that went back over a considerable length of time that as long as their case was pending before the Board and the courts that there could be no consideration given for a change of wages, hours or working conditions." These instructions, Burnham said, are still outstanding. Kurtz also testified in connection with his conversations with Koehler that unlike the cases of other employees who came to him and complained about their wages or other problems, he made no investigation in Koehler's case and did not speak with Burnham about the possibility of improving Koehler's rate because he "was aware of the situation" and "this would be impossible" in the light of the "Company's stand on this thing."

There really can be no doubt that Koehler and Vary would have gotten raises if their cases had been reviewed on the merits when Respondent reviewed other employees in September and December 1967. Burnham testified that he considered merit, length of service, and competitive rates in deciding whether employees deserved a wage increase. Koehler had received wage increases before 1966, when this case began, and Burnham said that he would assume that these increases were all on the basis of merit. Burnham also stated that, apart from his instructions not to give Koehler and Vary any consideration for a wage increase in September 1967, he knew of no reason why they would not have received a wage increase like the others, and "it would be safe to assume" that they would have in other circumstances. Burnham also noted that, with the exception of Koehler and Vary, every employee who appeared on Respondent's employee roster in March 1966 and who was still employed at the time of the hearing got some sort of a wage increase during that period.

Christensen, Koehler's and Vary's immediate supervisor, was aware that their rates were considerably below the area rate, which was one of the factors which Burnham's wage survey included, and Christensen, as has been noted earlier, recommended both Koehler and Vary for increases on the ground that the work they were performing qualified them for it. Asked if he had concluded on the basis of Koehler's merit, seniority, and rate, as compared to other rates in the industry, that, com-

pared to other employees, Koehler should get an increase, he stated that he had.

C. Analysis, Additional Findings, and Conclusions

Respondent's refusal to consider adjustments in Koehler's and Vary's wages and its failure to include them in the September and December 1967 wage programs, which resulted in increases for a substantial number of employees, was a clear violation of Section 8(a)(1) and (3) of the Act whether or not there is proof that Respondent was motivated by resentment towards the employees for having exercised their rights under Section 7 of the Act or by a desire to discourage membership in the Union. Respondent argues that since it had been ordered to bargain with the Union by the Board, it would have violated the Act if it had given Koehler and Vary wage increases "unilaterally," by which it means without bargaining with the Union.⁸ Respondent has refused to recognize the Union and it does not intend to bargain with it as the representative of the employees in the certified unit, at least until it has exhausted its rights of appeal to the courts, and so the obvious fallacy in its principal contention is that it purports to excuse its discriminatory treatment of Koehler and Vary on the ground that it has violated another section of the Act, namely, 8(a)(5), by refusing to accord the employees' statutory representative the recognition to which it is entitled.⁹ Admittedly, Koehler and Vary were ignored when all other employees were twice considered for wage adjustments, and clearly, as I found, Koehler and Vary would have gotten substantial wage increases if it had not been for Respondent's policy regarding them. Koehler and Vary were the only employees in the bargaining unit and both were members of the Union. Respondent's position that it could not elevate the wages of these employees while the case under Section 8(a)(5) of the Act remains "unresolved" is tantamount to a position that the employees will be treated differently from other employees because they caused the Union to be selected, and that this difference in treatment will continue so long as the employees continue to support the Union, the Union continues to press their charges, and the Board insists on protecting their rights. In short, Respondent's conduct is "inherently destructive" of employee interests and basic rights.¹⁰ It is clear that Koehler and Vary would not have been treated as they were but for the Union, and it appears that Respondent has no legitimate purpose to justify its conduct.¹¹

⁸ Respondent relies on *NLRB v. Benne Katz, d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736, 743, and *May Department Stores d/b/a Famous-Barr Company v. NLRB*, 326 U.S. 376, 384-385, where it was held that an employer who is under a statutory duty to bargain with a certified representative of his employees violates this duty by altering conditions of employment without first bargaining with the representative.

⁹ Even a good-faith doubt as to the appropriateness of the unit does not preclude the issuance of a bargaining order. *NLRB v. Quality Markets,*

Inc., 387 F.2d 20, 24, fn. 3 (C.A. 3), *Southland Paint Co.*, 156 NLRB 22, 23.

¹⁰ *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33, 34. See *The Great Atlantic & Pacific Tea Company, Inc.*, 166 NLRB 27, *Darling & Company*, 170 NLRB 1068.

¹¹ *The Kroger Co.*, 164 NLRB 362, *Flowers Baking Company, Inc.*, 161 NLRB 1429, 1440, *Russell-Newman Manufacturing Company, Inc.*, 167 NLRB 1112.

I also find that Respondent was motivated in treating Koehler and Vary as it did by a desire to discourage membership in the Union. I have indicated earlier that I found Koehler to be a credible witness and I here specifically credit his testimony over Christensen's. Koehler testified about a number of conversations with Christensen in which Christensen told him that he couldn't get an increase because he and Vary "went for a union." Christensen, as set out in more detail above, said that all that he ever told Koehler and Vary was that he could not recommend them for wage increases until "the matter was settled one way or the other." I do not credit Christensen's skeletal account of his conversations with Koehler and Vary for a number of reasons. First of all, Koehler appeared to be recounting the events as he honestly recalled them, but Christensen appeared to be understating what had happened. In addition, Koehler was corroborated by Vary with respect to the "went for a union" remark, and it was evident from some of Christensen's admissions that the talks with Koehler were more detailed than it first appeared from his direct examination. As found above, Christensen remembered that there was reference to "harmony" in the plant in connection with a wage increase discussion with Koehler, and he also remembered something about Koehler indicating that it might have been better if he had not joined the Union. I find, as evidence of animus as well as a separate violation of Section 8(a)(1) of the Act, that Christensen told these employees that they would not receive wage increases because they were members of the Union and because the Union continued to claim to represent them. I also find, for essentially the same reasons, that Christensen told Koehler during one of their conversations that he had discussed the matter with Burnham who said that the employees would receive no increases because they had joined a union, and that, in another conversation, he told Koehler that Respondent's labor relations counsel, Burks, had told him, when he brought the matter to his attention, that there would be no raises, for, if the Respondent granted increases, "they would be giving into the union and recognizing the union." Such statements are evidence of Respondent's motive and additional violations of Section 8(a)(1) of the Act.

The complaint also alleges, and I find, that Respondent promised employees wage increases if they withdrew from the Union. During one of his many conversations with Christensen about his wage rate, Koehler voiced regret about having become involved with the Union, and Christensen remarked that if Koehler and Vary withdrew from the Union they would get a higher rate. As found above, Christensen told Koehler later that Kurtz might have some ideas on how he could withdraw

from the Union, and he arranged for Koehler to see him. During Koehler's meeting with Kurtz, Kurtz told him that if he and Vary did withdraw from the Union, the Company would raise their rates. It appears that Koehler initiated all conversations with Christensen, and it also appears that it was he who first stated that he was unhappy about the delay caused by litigation, had second thoughts about the Union, and ideas about resigning. Nevertheless, I find that Christensen and Kurtz used Koehler's uncertain and unhappy frame of mind, which existed because of Respondent's refusal to recognize the Union with which he is affiliated and as a result of Respondent's disparate treatment of him, to encourage him to withdraw from the Union on the promise of a wage increase for both employees. By such conduct, Respondent violated Section 8(a)(1) of the Act.

Although Koehler at one stage of his examination could not recall Christensen making any suggestions about the Union withdrawing its unfair labor practice charges, he was able to recall a conversation about it with Christensen when his memory was refreshed. I find, as Koehler testified, that Christensen asked him why he did not ask the Union to withdraw its charges so that he and Vary could get raises in pay, and that he responded that he had done so, but that the Union refused to withdraw.¹² Such suggestion was an additional violation of Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

It having been found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent illegally deprived Koehler and Vary of wage increases in September and December 1967 and has continued to deprive them of wage increases since that time in violation of the Act, it will be recommended that Respondent make Koehler and Vary whole for the loss of earnings they suffered by reason of the discrimina-

¹² The reference is to Case 22-CA-2961, the refusal-to-bargain charge which grew out of Respondent's refusal to honor the Union's certification

tion against them by payment to them of the additional sums of money which they would have earned as wages from the date of discrimination against them to the date that Respondent elevates their wage rates to where they would have been absent the discrimination against them. Interest on backpay shall be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

It will also be recommended that Respondent preserve and make available to the Board, upon request, payroll and other records to facilitate the computation of the amounts of back wages.

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. The Respondent is 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. By denying Koehler and Vary wage increases in September and December 1967, and by continuing to deny said employees wage increases ever since, Respondent discriminated as to their terms and conditions of employment and thereby sought to discourage membership in the union, which had been chosen by them as their collective-bargaining agent, in violation of Section 8(a)(3) of the Act.

4. By the conduct set forth in section III which has been found to constitute unfair labor practices, Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed to them by Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that Howard Johnson Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the Union, or in any other labor organization, by withholding wage increases from employees.

(b) Advising employees that they will receive wage increases if they withdraw their membership in and support of the Union.

(c) Informing employees that they would receive no wage increases as long as they were members of the Union and as long as the Union claimed to represent them pursuant to its certification of representatives.

(d) In any other manner interfering with the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

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

(a) Adjust the wage rates of Koehler and Vary by conforming such rates to the rates they would have received if Respondent had not discriminated against them.

(b) Make Koehler and Vary whole for losses of wages they suffered as a result of the discrimination against them as set forth in the section of the Trial Examiner's decision entitled "The Remedy "

(c) Preserve and, upon request, make available to the Board or its agents all payroll records and other records in Respondent's possession necessary for the computation of lost earnings due hereunder.

(d) Post at its Englewood, New Jersey, plant involved herein copies of the attached notice marked "Appendix."¹³ Copies of said notice, to be furnished by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material

(e) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.¹⁴

¹³ In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order "

¹⁴ In the event that this Recommended Order is adopted by the Board this provision shall be modified to read "Notify the Regional Director for Region 22, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith "

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in International Union of Operating Engineers, Local 68, AFL-CIO, or any other labor organization, by withholding wage increases from employees.

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WE WILL NOT tell employees that they will receive wage increases if they withdraw their membership in and support of said Union.

WE WILL NOT tell employees that they will receive no wage increases as long as they are members of said Union or as long as said Union claims to represent them under its certification of representatives.

WE WILL adjust the rates of employees Koehler and Vary by raising said rates to what they would be if they had not been discriminated against.

WE WILL make Koehler and Vary whole for loss of earnings suffered as a result of not being considered for wage increases and not being raised when other employees were by paying them the additional wages they would have earned if they had been considered and raised like other employees.

WE WILL NOT in any other manner interfere with the rights guaranteed employees in Section 7 of the Act, except to the extent that

such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment 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 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 614 National Newark Building, 744 Broad Street, Newark, New Jersey 07102, Telephone 645-3088.