

Inn Credible Caterers, Ltd. and Hotel Employees and Restaurant Employees Union Local 100, New York, New York and Vicinity. Case 34–CA–8845

April 9, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN
AND HURTGEN

On April 17, 2000,¹ Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order and notice, as modified.⁴

For the reasons stated more fully by the judge, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. Thus, we agree with the judge's findings that the Respondent was a successor employer, that the Union demanded recognition and bargaining, and that the Respondent was obligated to recognize the Union and bargain as of April 18, when a substantial and representative complement was reached. We also agree with the judge's reasoning and conclusion that the May 6 petition did not provide the Respondent with a good-faith doubt as to the Union's majority status. Having found that the Respondent unlawfully refused to recognize and bargain with the Union as of April 18, the May 6 petition could not have formed the basis for good-faith doubt.

¹ All subsequent dates are in 1999.

² We modify the judge's decision to reflect that by April 18, there were six banquet wait staff employed at the Inn and that by May 16, there were four housekeeping employees and nine food court employees at the Inn. We further note that as of April 18, the gift shop employed 50 percent of the employees hired there by May 16.

³ In affirming the judge's findings and conclusions, we do not adopt his finding that the March 8 notice establishes the actual date that the Respondent took over the operation of the Inn and began to formally operate the Inn in the same manner as the prior employer Aramark. We also do not adopt the judge's finding that the Respondent's position letter constituted an admission that the April 16 payroll period could be utilized for determining majority status.

⁴ We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997).

Further, regardless of whether the Respondent had properly recognized the Union on April 18, the Respondent could not lawfully have withdrawn recognition on May 6 under an alternative ground. *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999). Under the Board's rationale in *St. Elizabeth Manor*, once the Respondent's obligation to bargain attached on April 18, the Union was entitled to a reasonable period of bargaining without challenge to its majority status through a decertification effort, election petitions, or Respondent claims of Union loss of majority support or good-faith doubt as to that majority status.⁵ Here, a reasonable period of bargaining clearly had not elapsed by the time the May 6 petition was presented to the Respondent.⁶

We further agree, for the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), and *Williams Enterprises*, 312 NLRB 937 (1993), enf. 50 F.3d 1280 (4th Cir. 1995), that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful refusal to recognize and bargain with the Union. We adhere to the view, reaffirmed by the Board in *Caterair*, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." 322 NLRB at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In the *Vincent* case, the court summarized the court's law as requiring that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' §7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3)

⁵ The effect of the Board's decision in *St. Elizabeth Manor* was to return to the principle expressed in *Landmark International Trucks*, 257 NLRB 1375 (1981), enf. denied 699 F.2d 815 (6th Cir. 1983), that a successor employer violates Sec. 8(a)(5) if it withdraws recognition before a reasonable period of time for bargaining has elapsed, whether that withdrawal is based on a good-faith doubt of the union's continuing majority status or evidence of actual loss of majority status. See *St. Elizabeth Manor*, supra. Accordingly, the contrary view, as expressed in *Harley-Davidson Transportation Co.*, 273 NLRB 1531 (1985), is clearly no longer good law after *St. Elizabeth Manor*.

⁶ For the reasons set forth in the majority opinion in *St. Elizabeth Manor*, we reject our concurring colleague's criticisms of the successor bar doctrine, including his discussion of *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).

whether alternative remedies are adequate to remedy the violations of the Act.” Id. at 738.

Although we respectfully disagree with the court’s requirement for the reasons set forth in *Caterair*, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.⁷

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent’s unlawful refusal to recognize and bargain with the Union. In contrast, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union’s continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation.

We note that the Respondent never recognized the Union and never suggested it would bargain with the Union once a substantial and representative complement of employees was reached. The May 6 petition did not reflect free choice under Section 7 but rather the effect of the Respondent’s unlawful refusal to bargain. These circumstances support giving greater weight to the Section 7 rights of former Aramark employees that were infringed by the Respondent’s refusal to recognize the Union.

(2) The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent’s incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition or by Respondent’s withdrawal of recognition, to achieve immediate results at the bargaining table following the Board’s resolution of its unfair labor practice charge and issuance of a cease-and-desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent’s violations because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where litigation of the Union’s charge took over a year and the Respondent’s unfair labor practices were of a continuing nature and were likely to have a continuing

effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued representation.

Finally, the successor bar rule adopted in *St. Elizabeth Manor* effectively provides the same reasonable period for bargaining here as would an affirmative bargaining order.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Inn Credible Caterers, Ltd., Bear Mountain, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

1. Substitute the following as paragraphs 2(b) and (c).

“(b) Within 14 days after service by the Region, post at its Bear Mountain, New York facility copies of the attached notice marked “Appendix.”² Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or removed its presence from the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 18, 1999.

“(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.”

2. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, concurring.

I agree with my colleagues that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and that an af-

⁷ Member Hurtgen does not disagree with the court’s requirement.

firmative bargaining order is appropriate. I write separately to explain how this case illustrates the problem presented by *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), a case in which I dissented.

The Respondent in this case was required to recognize and bargain with the Union as of April 18, 1999, when a substantial and representative complement was reached. Because the Respondent failed and refused to do so, it could not thereafter rely on the May 6, 1999 petition presented by 37 employees—stating that they did not desire continued union representation. That petition was tainted by the Respondent's prior unlawful refusal to recognize and bargain. Accordingly, I agree with my colleagues that the Respondent could not rely on the petition as a basis for not recognizing the Union. However, as discussed below, I do not agree with my colleagues' alternative rationale for finding a violation.

According to my colleagues, regardless of whether the Respondent had properly recognized the Union on April 18, the May 6 petition could not have been relied upon by the Respondent to withdraw recognition. That is, based on their extension of *St. Elizabeth Manor* to an unfair labor practice case, they find that an employer violates Section 8(a)(5) if it declines to recognize the union, even if, during a reasonable period, a majority of employees validly rejects the union. I cannot agree. Indeed, I find that the ill-advised journey that the majority began in *St. Elizabeth Manor*, a representation case, has now been unwisely extended to the unfair labor practice context.

In *St. Elizabeth Manor*, the Board majority impliedly rejected the settled and well-reasoned precedent of *Harley-Davidson Transportation Co.*, 273 NLRB 1531 (1985), which provided that:

[W]here, as here, a successor employer recognizes a union which has been certified for a year or more, the union enjoys a rebuttable presumption of majority status only. A successor may lawfully withdraw from negotiation at any time following recognition if it can show that the union had in fact lost its majority status at the time of the refusal to bargain or that the refusal to bargain was grounded on a good-faith doubt based on objective factors that the union continued to command majority support. [Footnote omitted.]

Today, my colleagues wander further afield and expressly overrule *Harley-Davidson*. In so doing, they reject the rebuttable presumption of the union's majority status in favor of an irrebuttable presumption. The effect is to forbid a successor employer from withdrawing recognition regardless of facts indicating that the union no longer maintains majority status or support. Thus, apply-

ing *St. Elizabeth Manor* here, the Respondent would have been foreclosed from withdrawing recognition based on a good-faith doubt concerning the Union's majority status. In my view, this result would offend the Section 7 rights of employees. In this regard, I note that one week after attaining successorship status, the predecessor employees were no longer a majority of the Respondent's unit employees. Further, less than 3 weeks later, 37 unit employees (out of a bargaining unit that fluctuated in peak times between 77 and 81) indicated via petition that they no longer wished to be represented by the Union.

By rendering the May 6 petition a nullity, *St. Elizabeth Manor* would deprive unit employees of their Section 7 freedom of choice and prevent them from exercising their rights to select a union representative or to have no union represent them.

Moreover, *St. Elizabeth Manor* directly contravenes the rationale of *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41 fn. 8 (1987). Although the Supreme Court found a successor bargaining obligation, the Court also preserved the successor's ability to lawfully withdraw from negotiation any time after recognition if it could show that the union had in fact lost its majority status at the time of the refusal to bargain or that the refusal to bargain was grounded on a good-faith doubt, based on objective factors, that the union continued to command majority support. Thus, under *Fall River*, employees who no longer want to be represented by the union may file a petition which the successor may consider grounds for a good-faith doubt. That employee right, pronounced by the Supreme Court, has been foreclosed by *St. Elizabeth Manor*. Thus, if the Respondent had recognized the Union as of April 18, I would have honored the Section 7 rights of the employees to choose nonrepresentation.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Hotel Employees and Restaurant Employees Union, Local 100, New York, New York and Vicinity as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full time and regular part time employees, including all waiters/waitresses, host/hostesses, cashiers, bus

help, cooks, assistant cooks, pantry employees, food preparation employees, dishwashers, counter sales employees, food handlers, bakers, bartending employees, chamberpersons, housepersons/bell help, laundry employees, cloakroom employees, porters, front desk employees, and all service and maintenance employees employed by us at the Bear Mountain Inn; excluding all office clerical employees, professional employees, guards, summer concession employees hired to do summer concession work between May 15 and September 15, and all other employees and supervisors as defined in the Act as amended in accordance with Board certification #2-RC-17795 dated December 12, 1997.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees when they are exercising their rights under Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union as the exclusive bargaining representative of our employees in the unit described above, with respect to rates of pay, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

INN CREDIBLE CATERERS, LTD.

Thomas E. Quigley, Esq., for the General Counsel.
Lewis H. Silverman and Cody Jaffe, Esqs. (Jackson, Lewis Schnitzler & Krupman), for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on December 14, 1999, in Goshen, New York.

A charge was filed by Hotel Employees and Restaurant Employees Union Local 100, New York, New York and Vicinity (the Union) against Inn Credible Caterers, Ltd. (Respondent) on May 10, 1999. On August 31, 1999, a complaint issued alleging that Respondent had refused to recognize the Union as the collective-bargaining representative of a specific unit of employees employed by Respondent, in violation of Section 8(a)(5).

On the entire record in this case, including my observation of the demeanor of the witnesses, and a careful consideration of the briefs filed by the counsel for the General Counsel and counsel for Respondent, I make the following

FINDINGS OF FACTS

Respondent is a New York Corporation engaged in the catering and food service industry as a contractor. Respondent has a contract to perform such services with the Bear Mountain Inn (the Inn) and other similar facilities in New York State. Respondent, in connection with its services performed during a 12-month period ending July 31, 1999, for the Inn derived

gross revenues in excess of \$500,000. During the same 12-month period, Respondent purchased and received goods valued in excess of \$50,000 directly from points located outside the State of New York.

It is admitted, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I find that the Union is a labor organization within the meaning of the Section 2(5) of the Act.

The Inn is owned by the Palisades Interstate Park Commission (Palisades), which is an agency affiliated with the State of New York.

The Inn consists of a hotel restaurant with banquet facilities, a gift shop, a swimming pool, and various sports facilities. Prior to Respondent's operation of the Inn's facilities, such operation was contracted to Aramark, a corporation similar to Respondent. Aramark had a long series of contracts with the Inn to operate the Inn's facilities. During this period Aramark had a series of successive collective-bargaining agreements with the Union covering the following unit of employees:

All full time and regular part time employees, including all waiters/waitresses, host/hostesses, cashiers, bus help, cooks, assistant cooks, pantry employees, food preparation employees, dishwashers, counter sales employees, food handlers, bakers, bartending employees, chamberpersons, housepersons/bell help, laundry employees, cloakroom employees, porters, front desk employees, and all service and maintenance employees employed by Respondent at the Bear Mountain Inn; excluding all office clerical employees, professional employees, guards, summer concession employees hired to do summer concession work between May 15 and September 15, and all other employees and supervisors as defined in the Act as amended in accordance with Board certification #2-RC-17795 dated December 12, 1977.

On or about January 1999, Aramark ceased its operation of the Inn. Negotiations with a new contractor, PEC, had commenced in late 1998. Sometime in late February the negotiations between PEC and Palisades terminated and the Inn was without a contractor. The January-February period is the Inn's least busy period. The Inn had contracted to handle seven catered functions during the month of March. With no caterer under contract to the Inn, the Inn contacted Respondent and executed a March only contract for the sole purpose of catering the March functions. For this purpose, Respondent used its' liquor license from its other contracts. Respondent did not apply for a liquor license for the March functions described above. The functions were staffed mostly by employees from its other operations. During this March period, the restaurant was closed to the public.

Frank Debari, president of Respondent, testified that the parties intended this March contract to be exclusively limited to the seven scheduled functions described above. There was no contemplation that such contract would encompass operating the Inn in the same manner as Aramark. However, as early as March 8, 1999, Respondent posted a notice on its letterhead addressed to "Bear Mountain Inn Staff" stating that:

Effective March, 1999, Inn Credible Caterers will be handling the operations at the Bear Mountain Inn & Complex.

We will be holding interviews for all positions on Monday, March 8, from 3 p.m.–7 p.m. in the upstairs lobby. You are all invited to submit your applications and to be interviewed. We look forward to talking to you all.

Notwithstanding Debari's testimony, I find that Respondent's March 8 notice establishes the actual date that Respondent took over the operation of the Inn and began to formally operate the Inn in the same manner as the Inns' predecessor, Aramark. A formal agreement to operate the Inn was reached on April 3. A written agreement was received by Respondent on April 29. The term of this agreement was 22 months.

On or about early March 1999, Union Representative Cliff Fried became aware of Respondent's presence at the Inn. By a letter dated March 3, the Union notified Debari that they represented the workers formerly employed by Aramark, requested that Respondent hire 60 of these employees, and that Respondent contact the Union to arrange a meeting to discuss the workers and make Respondent's takeover of the Aramark operation a smooth transition.

On March 12 Fried credibly testified that he went to the Inn and met with Debari briefly. Fried asked Debari to recognize the Union and negotiate a collective-bargaining agreement. Debari told Fried that Respondent was nonunion.

On March 23, Field sent Debari another letter with a copy of the 1993–1994 collective-bargaining agreement between the Union and Aramark and an "assumption agreement." The letter requested Debari sign and return the documents as soon as possible.

By a letter dated April 21, the Union requested Respondent to meet and negotiate with it "as we are the recognized exclusive bargaining agent of the workers of the Bear Mountain Inn." It is admitted that Respondent has, at all times material, refused to recognize and bargain with the Union.

The Union contends that it represented a majority of Respondent's unit employees in a representative compliment as of April 18. Respondent contends that it did not employ a representative compliment of such employees until May 16.

The payroll records establish, and the parties have stipulated, that on April 18 Respondent employed 47 unit employees of which 26 unit employees were members of the Union previously employed by Aramark. By May 16, in anticipation of the Memorial Day weekend, and the time Respondent is at, or very close to its peak of the year employment, Respondent employed 79 unit employees of which 29 unit employees were members of the Union previously employed by Aramark.

With respect to the unit classifications as of April 18, Respondent employed employees in 13 of the 15 unit job classifications as follows.

By April 18, the work force included 6 of the 7 front desk employees ultimately hired by May 16, 6 housekeeping employees; 1 laundry employee; 5 of the 8 food court employees; 1 of the 2 gift shop employees; 3 of the 5 restaurant wait staff; 2 of the 2 restaurant bartenders; 2 of the 3 cooks; 4 of the 4 banquet bartenders; 6 of the 11 utility employees; and the 1 unit

employee in "food and beverage." Only in the banquet department did the employees hired as of April 18 constitute less than a majority of the amount eventually hired: 5 of the 16 banquet wait staff; and 4 of 11 banquet cooks.

Furthermore, the two additional job classifications that were not filled on April 18 but were filled by May 16—the host/hostess and the busser—consisted of just three employees. I find that these two new classifications did not bring new or different skills such as to render the previous complement "unrepresentative." See *Premium Foods, Inc.*, 260 NLB 708, 714–715 (1982), enfd. 709 F 2d 623, 630, (9th Cir. 1983).

At some point during the first week in May, an employee of the Inn, handed Debari and Freid a petition purportedly signed by a number of unit employees. The letter, addressed to Freid, stated the following:

We the employees of Bear Mountain Inn do not wish at this time to be represented by Local 100 or any other Local Union.

We appreciate what you have done for us in the past and we know that you have worked hard for us as well. Thank you.

On May 9, Respondent employed 81 unit employees. Respondent's assistant general manager verified 37 of the 51 signatures. No employees testified concerning how the petition came about or who signed the petition.

Analysis and Conclusion

In *Sierra Realty Corp.*, 317 NLRB 832, 835 (1995), the Board citing *Burns Security Services v. NLRB*, 406 U.S. 272 (1972), and *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 43–45 (1987) stated:

The threshold test developed by the Board and approved by the Supreme Court in *Burns* and *Fall River Dyeing* for determining successorship is: (1) whether a majority of the new employer's work force in an appropriate unit are former employees of the predecessor employer and (2) whether the new employer conducts essentially the same business as the predecessor employer.

There is no doubt that Respondent took over the Aramark operation as a successor employer. In the instant case the business of both Aramark and Respondent are the same. They both handle the catering and recreational facilities for the Inn. Respondent's employees perform essentially the same jobs, use the same production process, perform the same services, and service the same customers, namely, the public. *Fall River*, supra at 43. Respondent does not contest these findings. The only issue raised in this case by Respondent, is whether at the time of the demand, the Union represented a majority of the unit employees. The Union contends that on April 18, Respondent employed a representative compliment of employees. Respondent contends that it was not until May 16 that Respondent employed a representative compliment of employees, and on this date the Union did not represent a majority of its employees.

In *Fall River*, supra, the Court approved the Boards' five-factor test in deciding when a representative compliment of employees exists at a specific date. The factors set forth are (1) whether the job classifications designated for the operation were occupied, or substantially so, (2) whether the operation

was in normal or substantially normal production, (3) the size of the compliment on the date of normal production, (4) the time expected to elapse before a substantially larger compliment would be at work, and (5) the relative certainty of the employer's expected expansion.

I conclude that Respondent employed a representative compliment of employees on April 18. By April 18, Respondent was in normal operation—47 unit employees were working in 13 of the 15 unit job classifications. Moreover the majority of these classifications (11 of 13 unit classifications) were in place by April 18, which represented 50 percent or more of the size eventually reached. Moreover, the two additional job classifications that were not filled on April 18 but were filled by May 16, the host/hostess and busser, consisted of just three employees. These classifications did not constitute skills different from classifications already staffed by April 18.

Further, on May 16, the date Respondent contends it employed a representative compliment of 79 unit employees, Respondent was in fact at, or very close to its peak, or a full compliment of unit employees. The peak period for the Inn has always been the period of time between Memorial Day and Labor Day. The payroll records establish that during this peak period Respondent also employed various nonunit employees i.e., "boat people," which increased its total employee compliment to about 100 employees. However, the number of unit employees during the peak season did not increase substantially after May 16. Thus, on April 16, Respondent employed approximately 60 percent of its eventual peak period unit employee work force.

Moreover, Respondent, by its attorneys, in a position letter to the Regional Director for Region 34, contended that although the May 21 payroll was the "appropriate time" for determining majority status, the April 16 payroll could be utilized for determining majority status rather than the March 12 date the Union had urged upon the General Counsel, because "it was not until April 16, that Inn Credible Caterers had finally received its liquor . . . and opened the Inn for regular business."

I conclude that on April 18, Respondent employed a representative compliment of 47 unit employees, 26 of who were employees employed by the predecessor, Aramark, and members of the Union. Thus on April 18, the Union represented a majority of a representative compliment of Respondent's employees.

Respondent contends that where there is a definite plan to substantially increase an employer's work force within a short period of time (2–3 months) it is appropriate to delay the termination of that employer's bargaining obligation for that limited period of time. *Meyers Custom Products*, 278 NLRB 636 (1986).

In *Meyers*, the employer purchased the assets of a company that had employed about 21 unit employees covered by a collective-bargaining agreement. The employer initially hired 13 employees, 9 of whom were predecessor employees. When the union demanded recognition 3 weeks later, the employer declined and informed the Union that it planned a work force of 22 to 25 employees sometime in the near future. One month later, the employee complement had indeed risen to 25, only 9 of who were predecessor employees. The employer argued that

since it had expected, and realized, an increase in its employee compliment within a short (2-month) period of time, the Board should delay its majority status determination for that period. The General Counsel argued that the employer began its operations without a hiatus, carried on the same business as before and had a representative complement of employees on the day of the takeover. The Board agreed with the employer and dismissed the complaint, noting that the parties had stipulated that the employer planned, before beginning operations, to take 2 to 3 months to select and train a full-employee complement.

However, the instant case is significantly different from the facts of *Meyers*. In *Meyers*, unlike in this case, the employer intended to operate at such full compliment for an indefinite period of time. Respondents' operations are admittedly seasonal, the peak employment period being the Memorial Day to Labor Day period. To accept Respondent's contention would amount to a finding that the only time Respondent's employees could be organized would be the summer period of each year, when they employed their peak compliment of employees.

Counsel for General Counsel cites *Jesse Beck's Riverside Hotel*, 279 NLRB 405 (1986), as controlling authority. In *Beck's* the Board, adopting the administrative law judge's decision, rejected the employer's attempt to utilize an upcoming seasonal business upturn to delay to avoid a successor's bargaining obligation. In *Beck's*, the employer's business had predictable peaks each year. The judge acknowledged the seasonal upturn and the reasonable expectation that in the immediate future there would be additional employees, but concluded that "no substantial justification has been shown for delaying the representation which this Act is designed to guarantee employees." *Id.* at 410.

Beck's is directly on point in this case. This is a seasonal industry case, with an admitted seasonal upturn followed by the normal seasonal downturn. Respondent became a true successor in mid-April 1999 when it began operating normally, and by April 18 it employed a substantial representative complement of employees as those terms have been defined by the Board and the Supreme Court. By that date, Respondent employed as a majority of the unit employees from its unionized predecessor; there was an outstanding bargaining demand, and, thus, the bargaining obligation attached at that point. See also *Staten Island Hotel*, *supra*, 318 NLRB at 853 fn. 4 (union's request for recognition is deemed to be continuing in nature).

Respondent contends in the alternative, that it had a good-faith doubt as to the Union's majority status based upon the May 6 petition submitted to Debari on May 9. I find no merit to Respondent's contention. It is established Board Law that once determined that an employer has unlawfully refused to recognize and bargain with a labor organization, the employer is thereafter precluded from defending such refusal based on an employee petition submitted after the date that the employer was obligated to recognize and bargain with the Union. *White-wood Maintenance Co.*, 292 NLRB 1159, 1210 (1989), citing *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944). Respondent argues that it is reasonable to assume that the majority of the employees had been entertaining disaffection for the Union prior to April 18. I make no such assumption. In this regard there was no witness to or other evidence to establish how such

petition originated. Further, it was only possible to identify 37 of the 51 signatures on the petition, or 37 of 80 unit employees employed at the time the petition was submitted to Respondent. Accordingly, I reject Respondent's contention.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Aramark is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
3. The Union is a labor organization within the meaning of Section 2(5) of the Act, and at all times material, has been the collective-bargaining representative of the following unit of employees:

All full time and regular part time employees, including all waiters/waitresses, host/hostesses, cashiers, bus help, cooks, assistant cooks, pantry employees, food preparation employees, dishwashers, counter sales employees, food handlers, bakers, bartending employees, chamberpersons, housepersons/bell help, laundry employees, cloakroom employees, porters, front desk employees, and all service and maintenance employees employed by Respondent at the Bear Mountain Inn; excluding all office clerical employees, professional employees, guards, summer concession employees hired to do summer concession work between May 15 and September 15, and all other employees and supervisors as defined in the Act as amended in accordance with Board certification #2-RC-17795 dated December 12, 1977.

4. Respondent is a successor to Aramark with respect to the operation of the Inn.
5. By refusing to recognize and bargain with the Union as the collective-bargaining representative of the employees in the unit described above, Respondent has violated Section 8(a)(1) and (5) of the Act.
6. The aforesaid labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that Respondent has violated Section 8(a)(1) and (5) of the Act, I recommend that it be ordered to cease and desist and to take certain affirmative action to effectuate the policies of the Act.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); and *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

ORDER

The Respondent, Inn Credible Caterers, Ltd., Bear Mountain, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Interfering with, restraining, and coercing its employees in the exercise of their rights under Section 7 of the Act by
 - (b) Refusing to bargain collectively with Hotel Employees and Restaurant Employees Union Local 100, New York, New York, and Vicinity as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All full time and regular part time employees, including all waiters/waitresses, host/hostesses, cashiers, bus help, cooks, assistant cooks, pantry employees, food preparation employees, dishwashers, counter sales employees, food handlers, bakers, bartending employees, chamberpersons, housepersons/bell help, laundry employees, cloakroom employees, porters, front desk employees, and all service and maintenance employees employed by Respondent at the Bear Mountain Inn; excluding all office clerical employees, professional employees, guards, summer concession employees hired to do summer concession work between May 15 and September 15, and all other employees and supervisors as defined in the Act as amended in accordance with Board certification #2-RC-17795 dated December 12, 1977.

- (c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with their Union as the exclusive bargaining representative of its employees in the unit described above, with respect to rates of pay, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Bear Mountain, New York facility copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

