

INDEX.

	PAGE
Writ of Certiorari	1
Allocatur	2
Return to Writ	2
Hearing of March 7, 1940.....	4

WITNESSES FOR PETITIONER.

Henry Finston,	
Direct	5
Recalled,	
Direct	19
Nathan Linn,	
Direct	13
Hearing of February 25, 1944.....	35

WITNESS FOR PETITIONER.

Henry Finston,	
Direct	37
Cross	45
Re-direct	49
Re-cross	50
Argument	50
Decision	62
Decision on Rehearing	64
Reasons	66
Order Deleting Exhibits	70

	PAGE
Opinion of Supreme Court.....	72
Order Reversing Determination of Unemployment Compensation Commission ...	80
Notice and Grounds of Appeal.....	81

EXHIBITS.

	Admitted at Page	Printed at Page
P-1—Letter	38	39
P-2—Form UC-1a	44	59
C-1—Form UC-1a for the year 1936.	47	61

Writ of Certiorari.

NEW JERSEY, SS.:

THE STATE OF NEW JERSEY TO UN-
EMPLOYMENT COMPENSATION COMMIS-
SION OF NEW JERSEY—GREETING:

We being willing, for certain reasons, to be cer-
tified of a certain decision rendered on May 4,
1944 by the Unemployment Compensation Com- 10
mission of New Jersey, in relation to the applica-
tion to said Unemployment Compensation Com-
mission of New Jersey, by Augusta Naidech,
David Naidech and Henry Finston, trading as
New Jersey Coal & Supply Co., a partnership,
and by Henry Finston and David Naidech, trad-
ing as Jersey Appliance Co., a partnership, for a
ruling holding the above named partnerships as
non-subject employers under the terms and pro-
visions of the New Jersey Unemployment Com- 20
pensation Law, do command you that you certify
and send under your seal, to our Justices of our
Supreme Court of Judicature, at Trenton, on the
30 day of June, 1944, the said decision of said
Unemployment Compensation Commission of New
Jersey, above mentioned, together with all things
touching and concerning the same, as fully and
completely as they remain before you, together
with this our writ, that we may cause to be done
thereupon what of right and justice according 30
to the laws of the State of New Jersey ought to
be done.

WITNESS, THOMAS J. BROGAN, Esquire, Chief
Justice of our Supreme Court, at Trenton, this
12 day of June in the year of Our Lord One Thou-
sand Nine Hundred and Forty-four.

JAMES J. GAVIN,
Clerk.

WILLIAM HARRIS,
Attorney for Prosecutor.

Allocatur.

I allow this writ; let it be sealed.

June 10, 1944.

CHARLES W. PARKER,
Justice of the Supreme Court.

10

Return to Writ.**NEW JERSEY SUPREME COURT.**

20 HENRY FINSTON & DAVID NAIDECH
T/A JERSEY APPLIANCE Co.,
AUGUSTA NAIDECH, DAVID NAIDECH
& HENRY FINSTON, T/A NEW
JERSEY COAL & SUPPLY Co. and
NEW JERSEY COAL & SUPPLY
Co., Inc.,

Prosecutor,

vs.

30 UNEMPLOYMENT COMPENSATION
COMMISSION OF NEW JERSEY,
Defendant.

On Writ of
Certiorari.

Return to Writ.

*To the Honorable, the Justices of the Supreme
Court of Judicature, State of New Jersey:*

40 In obedience to the command of this writ, di-
rected to the Unemployment Compensation Com-
mission of New Jersey, I, Dean H. Ashton, Acting
Secretary of the Unemployment Compensation

Return to Writ.

Commission of New Jersey, within named, do
 send under the seal of the Unemployment Com-
 pensation Commission of New Jersey to you, the
 Honorable Justices of the Supreme Court of Judi-
 cature of New Jersey, the decision of the Unem-
 ployment Compensation Commission of New Jer-
 sey, whereof mention is made in said writ, 10
 together with all things touching and concerning
 the same as fully and completely as they remain
 before us as within it is commanded.

IN WITNESS WHEREOF, I have hereto set my hand
 and seal of the said Unemployment Compensation
 Commission of New Jersey on this 28th day of
 June, 1944.

UNEMPLOYMENT COMPENSATION 20
 COMMISSION OF NEW JERSEY.

By DEAN H. ASHTON,
 Dean H. Ashton,
 Acting Secretary.

(Seal)

30

40

Hearing of March 7, 1940.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY.

10 IN THE MATTER
 of
DAVID NAIDECH and HENRY FINSTON, t/a JERSEY APPLIANCE
 COMPANY
 and
AUGUSTA NAIDECH, DAVID NAIDECH
 and HENRY FINSTON, t/a NEW
 JERSEY COAL & SUPPLY Co.

Transcript of
Testimony.

20

FORMAL HEARING.

Appearances:

ERNEST EGER, Commissioner of the Unemployment Compensation Commission of New Jersey;

30 CHARLES A. MALLOY, Chief Counsel for the Unemployment Compensation Commission of New Jersey;

WILLIAM S. CONKLIN, Secretary for the Unemployment Compensation Commission of New Jersey;

I. BERNARD HARKAVY, Chief Auditor for the Unemployment Compensation Commission of New Jersey;

40 DOMINIC J. HART, Legal Assistant for the Unemployment Compensation Commission of New Jersey;

Henry Finston, Petitioner—Direct.

SAMUEL F. SLAFF, Counsel for Jersey Appliance Company and New Jersey Coal & Supply Company;

NATHAN LINN, Accountant for Jersey Appliance Company and New Jersey Coal & Supply Company.

10

A formal hearing in this matter was held in Room 903, Trenton Trust Building, Trenton, New Jersey, on Thursday, March 7, 1940, at 10:30 A. M. Eastern Standard Time.

HENRY FINSTON, being duly sworn according to law, testifies:

20

Examination by Mr. Slaff:

Q. What is your name? A. Henry Finston.

Q. And where do you live? A. In Nutley.

Q. Are you acquainted with the New Jersey Coal & Supply Company? A. I am.

Q. What is the nature of the business, is it a corporation or a partnership? A. It is now a partnership.

Q. Who started the New Jersey Coal & Supply Company originally? A. It was originally started by Hyman Naidech, husband of Augusta Naidech.

30

Q. When did he die? A. He died in 1929.

Q. What became of the business after he died? A. Mrs. Naidech continued the business for a short time afterwards.

Q. Was it continued as a corporation or an individual business? A. It was as an individual trading as New Jersey Coal—I think it was Coal and Grain Supply at that time.

40

Henry Finston, Petitioner—Direct.

Q. Then was it incorporated? A. Then she was operating as an individual, trading as New Jersey Coal & Supply Company for approximately two or three years and then I entered into the business as her son-in-law. We formed a corporation.

10 Q. What date?

Mr. Harkavy: October 15, 1931.

A. That is right.

Q. Now in that corporation—what were the interests of the stockholders—who were they? A. The stockholders were Augusta Naidech, David Naidech, Henry Finston and Ida Finston.

20 Q. How many shares of stock were issued? A. I have the book here (refers to book). There were twenty shares issued.

Q. What was the par value of each share? A. \$100.00 each.

Q. How many shares were issued to Mrs. Naidech? A. Sixteen shares issued to Augusta Naidech.

Q. Yes, continue. A. Two shares were issued to David Naidech; one share to Ida Finston; one share to Henry Finston.

30 Mr. Harkavy: Just a minute — that doesn't make twenty. How many shares did David Naidech have?

A. David Naidech two.

Q. What became of the corporation? A. The corporation was dissolved.

Q. When? A. In June—as of July 1, 1937.

Mr. Harkavy: Do you want the exact date? We have a record of it here.

40

Mr. Slaff: We have it here.

Henry Finston, Petitioner—Direct.

Q. Do you—at any rate, the corporation was dissolved? Is that right? A. That is right.

Q. And a partnership was started? A. Yes, that is right.

Q. Who formed the new partnership? A. The partnership consisted of Augusta Naidech, David Naidech and Henry Finston.

10

Q. Now in this partnership, what interest did each have? A. The same interest was continued in the partnership as in the corporation—with Augusta Naidech 80%, and David Naidech 10% and I assumed Ida Finston's interest—making a total 10% as my share.

Q. Have you ever received any dividends or profits from the New Jersey Coal & Supply Company? A. None.

Q. What has been the nature of your remuneration in the New Jersey Coal & Supply Company? A. I have made a salary.

20

Q. You say you never received any dividends or profits? A. Never.

Q. Did you receive a liquidation dividend of any character as a result of the dissolution of the corporation? A. None whatever.

Q. Did anybody receive it? A. No.

Q. Who is the owner of the New Jersey Coal & Supply Company? A. Augusta Naidech.

30

Q. Is she your mother-in-law? A. Yes, that is right.

Q. Who decides the policy of the partnership? A. She does.

Q. Who guides all purchases of merchandise for the business—lumber, coal, fuel oil, those supplies? A. Well, she does, and I assist her.

Q. As a matter of fact, you are working for Mrs. Naidech, aren't you? Isn't that right? A. Yes, that is right.

40

Henry Finston, Petitioner—Direct.

Q. And does David Naidech work for Mrs. Naidech? Is that right? A. Yes, that is right.

Q. What does he receive for compensation, outside of board and lodging? A. In amount of money?

10 Q. Yes? A. I am not sure—I think about \$15.00 to \$20.00.

Q. Are you at liberty to sell your interest in the partnership to anybody? Have you the right to sell it, or are you bound by any agreements with your mother-in-law, Mrs. Naidech, not to sell? A. I couldn't sell my interest.

20 Q. Why? Have you made any agreement with respect to your interest? I would like to know whether the interest is yours or your mother-in-law's? Who owns it? A. It isn't mine—it is my mother-in-law's. I have no right to sell something that doesn't belong to me.

Q. Why do you say that you have no right to sell it? A. I had nothing to do with the formation of the business.

Q. Was this interest given to you for a consideration? Was it given to you for convenience? A. Just as a matter of convenience.

30 Q. What is the convenience? Describe it. I will rephrase that—I will put it this way. Does your mother-in-law—is your mother-in-law a literate person—does she read and write English very well? A. No, she does not.

Q. Is she well? A. She is not well.

Q. What is the condition of your mother-in-law? A. She has diabetes.

Q. How old a woman is she? A. About 55.

40 Q. Then does your mother-in-law take any part in the actual running of the business? The disposition of trucks? Who does that? A. I do that.

Henry Finston, Petitioner—Direct.

Q. Is that in the nature of the convenience you had in mind, or is there some other definition you want to give it? A. That is right.

Q. What else do you do—make collections there of all accounts? Where do you live by the way? A. With my mother-in-law.

Q. Two or one family house? A. One family house. 10

Q. In the same household with your wife and child? Is that right? A. That is right.

Mr. Harkavy: Is that the same household where David Naidech lives?

A. Yes.

Mr. Harkavy: Is he single? 20

A. Yes.

Q. Coming to the Jersey Appliance Company, what kind of a business is that? A. Electrical appliances.

Q. What do you sell? A. Refrigerators, washing machines and oil burners.

Q. That is all done, I assume, on the financial plan? A. That is right.

Q. When I say financial plan, is that F. H. A., conditional sales agreements? A. That is right. 30

Q. Where is that place of business? A. Belleville.

Q. And New Jersey Coal & Supply Company? A. In Nutley.

Q. How far apart are they? A. Approximately two miles.

Q. Who originated that business in Belleville? A. I did.

Q. You did? A. I did and my brother-in-law.

Q. How old is your brother-in-law? A. 25. 40

Henry Finston, Petitioner—Direct.

Q. Was—did you enter into any agreement with your brother-in-law respecting the ownership of that business? A. We started as a partnership.

Q. Did you have any stock in trade when you began, or was it just a name? A. Just a name.

10 Q. What did you have in the store? Did you have a desk? A. That is right.

Q. What is the number—the address of the business at Belleville? A. Recently we moved to a new location, and the address now is 539 Washington Street.

Q. So the point is, when you started this business in Belleville, you had no stock in trade. What did you have to sell? A. We had to buy some.

Q. You had no stock in trade then? A. None.

20 Q. So you sold merchandise you did not have in your possession, but what someone else had? Is that right? A. Yes, that is right.

Q. What was it? A. Refrigerators, washing machines and oil burners.

Q. Where were they delivered from? A. Delivered from the distributor's warehouse.

Q. Then you were a sort of an agency for a wholesaler. Is that right? A. Yes.

30 Q. What sort of burners were they — what equipment? Name them. A. Chrysler Oil Burner, tanks, oil, frigidaire and the Bendix home laundry.

Q. The orders are taken at the Belleville office and shipments made directly from the distributor? Is that right? A. That is right.

Q. The distributor is located where? A. In Newark.

40 Q. All right. Now, does the Jersey Appliance Company have any connection with the New Jersey Coal & Supply Company? A. None.

Henry Finston, Petitioner—Direct.

Q. Do the profits of the Jersey Appliance Company go to the New Jersey Coal & Supply Company? A. No.

Q. Has there ever been deposits in the account of the New Jersey Coal & Supply Company? A. No.

Q. You keep books in Belleville? Records in the Belleville office? A. Yes. 10

Q. Have you a bookkeeper in Belleville? A. Yes.

Q. You are sure that no part of the profits or funds of the Jersey Appliance Company have been mingled with the moneys of the New Jersey Coal & Supply Company? A. Never.

Q. And a separate account is kept? Is that right? A. That is right.

Q. Do you receive a salary from the Jersey Appliance Company, or have you a drawing account, or haven't there been any? A. There has not been any. 20

Q. Have you made no money there in Belleville? A. Just about breaking even.

Q. Let us get to the employees now. What kind of employees do you have in the Jersey Appliance Company? Are they today weekly or monthly employees, or neither? A. We have a bookkeeper, paid by the week; a sales manager, paid by the week, and two salesmen we pay on commission. 30

Q. Are they paid their commission on each separate transaction rendered by them? A. That is right.

Q. The salesmen sell the articles that you have described—oil burners—air conditioning—washing machines? Is that right? A. Yes, that is right.

Q. If a salesman sells an oil burner on Monday, what would be the extent of his commission? A. It all depends upon the amount of the sale. 40

Henry Finston, Petitioner—Direct.

Q. Well, supposing it cost \$100.00, what would he get? A. 10 per cent.

Q. When would he receive that? A. Saturday.

Q. So that you have a written contract with the salesman in each case? A. No, it is a mutual agreement.

10 Q. Is that a weekly proposition with the salesman? A. Yes.

Q. Are you at liberty to discharge the salesman each week? A. To discharge him?

Q. Why yes. I don't remember how many salesmen you said you had? A. Two.

Q. Two salesmen, the girl is three and the salesmanager makes four, is that right? A. Yes, that is right.

20 Q. It is true, is it not, that in addition to the gentlemen that are connected with Jersey Appliance Company in various ways, you have a man that does installation work? Is that right? A. Yes.

Q. How is that man engaged—engaged by the week—on a contract basis—or independent contract? A. He is engaged by the week.

Q. How much does he receive a week? A. \$35.00.

30 Q. Well now, is he steadily employed, or is he engaged each week? A. He is engaged each week, but he has been working steadily.

Q. Well, do you employ him in the summer-time? A. Yes.

Q. I want to find out if he is steadily employed? A. Yes.

Q. He is not like the salesmen in other words? A. No.

Q. That is all, is that right? A. That is right.

40 Q. Now the gentlemen that are connected in other ways—in other words, with the Jersey Ap-

Nathan Linn, for Petitioners—Direct.

pliance Company, whether as salesmen or installation men, or the girl, they have no connection with the Jersey Coal & Supply Company? A. None whatever.

Q. Do they give time to the Jersey Coal & Supply Company office to do any work there? A. No.

Q. Do they deliver lumber to the New Jersey Coal & Supply Company? A. No. 10

Q. Do they keep any books for them—sell cinder blocks or any materials employed by the New Jersey Coal & Supply Company? A. No.

Q. Do they do any collecting for them? A. No.

Q. Nothing at all, is that right? A. Yes.

NATHAN LINN, being duly sworn according to law, testifies: 20

Examination by Mr. Slaff:

Q. Mr. Linn, what is your business? A. I am a certified public accountant.

Q. Are you familiar with the New Jersey Coal & Supply Company business? A. I am.

Q. And who is the real owner of that business? A. My records show the business is a partnership. 30

Q. Who is the guiding spirit of that business? A. Mrs. Augusta Naidech.

Q. Does she give orders to the employees? A. Mrs. Naidech determines the main policy of the business.

Q. Do you report to her yourself? A. I do.

Q. Do you know the history of this business? A. I do from the time that the corporation—I became accountant for the business at the time it was a corporation. 40

Nathan Linn, for Petitioners—Direct.

Q. And who was the guiding spirit of the business when it was a corporation? A. Mrs. Augusta Naidech.

Q. Were you familiar with the dissolution of the corporation? A. I was.

Q. And the formation of the partnership? A. I was.

Q. Did Mrs. Naidech continue to be the boss of the business after the dissolution? A. She did.

Q. Do you—have you found any record in the New Jersey Coal & Supply Company records of any profit or dividend ever having been paid to Henry Finston and David Naidech? A. No dividend was ever paid.

Q. What is the extent of their remuneration from your examination of the records of the New Jersey Coal & Supply Company? A. Are you referring to the corporation?

Q. Yes. A. And whose remuneration are you referring to?

Q. Mr. Finston and Mr. Naidech. A. Finston and Naidech received salaries from the corporation.

Q. And in other respects, remembering the testimony of Mr. Finston—that respecting the history of the New Jersey Coal & Supply Company, is that substantially true as he stated it on the record? A. It is.

Q. Now in respect to the Jersey Appliance Company, have you examined the records of that enterprise? A. I do not believe that David Naidech, who was a stockholder in the corporation, derived any salary from the corporation during the time that I took care of the books of said corporation. I believe it is true.

Q. Continuing with the partnership, has he ever derived any salary or other remuneration of

Nathan Linn, for Petitioners—Direct.

New Jersey Coal & Supply Company as a partnership? A. From the partnership he has drawn funds occasionally, but no stated stipulated salary.

Q. Has he drawn any profits? A. No, except all funds drawn are in the nature of profits.

Q. The point is, has it been designated on the books of the New Jersey Coal & Supply Company as a salary or a dividend or a profit? What do you carry it as? A. The partnership draws it as partnership drawings and not as salary, since they are not salaries but drawings against possible profits. 10

Q. Now regarding the Jersey Appliance Company, who takes care of their records, do you know? A. I do.

Q. Have any profits of the Jersey Appliance Company been paid to the New Jersey Coal & Supply Company, or vice-versa? A. No, none have ever been paid. They have never declared any profits or merged in any way—both businesses are entirely separate and no financial interest is involved. 20

Q. The nature of the business of Jersey Appliance Company is what? A. Their business consists of merchandising oil burners, refrigerators and various other electrical appliances.

Q. What have you to say regarding the employees? Are you acquainted with the girl in his office and the various salesmen? A. Yes. 30

Q. How about the salesmen, are they employed on a salary or commission basis? A. The salesmen are employed on commission basis.

Q. And have you reviewed their accounts from time to time? A. I have.

Q. When are they paid, monthly or weekly? A. Weekly, if and when they have earned commissions during that particular week. 40

Nathan Linn, for Petitioners—Direct.

Q. So if no sale is made by the salesmen they draw nothing, is that right? A. Yes.

10 Q. Have you, from your examination of the records, been able to find a period when they did not receive any payment at all? A. Yes, occasionally, when a man does not sell any merchandise, he is not entitled to commission and does not receive any at the end of the week.

Q. Has that been true of the three salesmen they have? A. Possibly at various times.

Q. When do they not receive a commission, winter or summer—when is the most common time not to receive commission? A. Why at possibly—say the summertime, or later—the late fall and winter—when business is slow, and, therefore, the possibility of receiving remuneration would be less.

20 Q. Do you know of any definite instance? A. I do not recall any special instance of any salesmen, during those periods not receiving any remuneration. I do not remember.

Q. Your records would disclose that? A. Of course.

Q. I want to ask you again whether or not Mrs. Naidech or anybody else has any financial interest in Jersey Appliance Company or its management? A. What do you mean?

30 Q. Does Mrs. Naidech have any interest in Jersey Appliance Company at all? A. Mrs. Naidech has no interest in Jersey Appliance Company. She has nothing to do with the management or finances of that company.

Q. And does anybody else have anything to do with it except Henry Finston and David Naidech? A. David Naidech and Henry Finston are the sole owners of Jersey Appliance Company.

40

Nathan Linn, for Petitioners—Direct.

Mr. Malloy: Is Augusta Naidech a creditor of the Jersey Appliance Company?

A. She is not.

Mr. Eger: How many people are connected with the Jersey Appliance Company—in the capacity of either as a partner or commission men? 10

A. Do you mean employees and the partners?

Mr. Eger: What is the total number of people connected with the Appliance Company?

A. I would say it ranges between five and six.

Mr. Malloy: How about at present? 20

A. At present, I would say full-time employees five and one part-time employee. In other words, there is the helper for the serviceman at different times of the year.

Mr. Eger: That is the \$35.00 a week man?

A. Yes.

Mr. Malloy: Are any employees of the two units the same? 30

A. No.

Mr. Malloy: They are in different localities?

Mr. Harkavy: Yes.

Mr. Malloy: Which one of the partners gives his attention to the Jersey Appliance Company business? 40

Nathan Linn, for Petitioners—Direct.

A. They both attend to the Jersey Appliance Company business, possibly Henry Finston devotes a little more time to it than David Naidech.

Mr. Malloy: Does Henry Finston give any time to the joint partnership?

10 A. Yes.

Mr. Malloy: How about David Naidech, does he give time to the joint partnership?

A. I would say the major part of his time is devoted to Jersey Coal & Supply Company.

Mr. Malloy: Well, when you say major, what portion would you say?

20 A. 75 per cent.

Mr. Malloy: And with Mr. Finston it is possibly the other way around?

A. At least 75 per cent to Jersey Appliance Company, and not over 25 per cent to the New Jersey Coal & Supply Company, or thereabouts, if divisible in percentage, that would be about right.

30 Mr. Malloy: Henry Finston is really the individual who looks after the Jersey Appliance Company business, and David Naidech is the person who really looks after the New Jersey Coal & Supply Company business?

A. That is not true, they both do.

40 Mr. Harkavy: You said before that you had in the Jersey Appliance Company—that you had a bookkeeper, a sales-manager, two salesmen, one installation man and one part-time helper, is that correct?

Henry Finston, Petitioner, Recalled—Direct.

A. Yes. When the Jersey Appliance Company originally began business they did not employ any mechanic—installation man—the work was done through a separate company, by Essex Maintenance Company, which installed all the oil burners that the Jersey Appliance Company sold. Lately that was changed, because the Essex Maintenance Company, as I remember, went into bankruptcy and Mr. Finston or David Naidech, I do not remember who, hired a man to install burners. 10

Mr. Eger: They had a set contract to do that work, as to installing the burners?

A. Mr. Finston can answer that better.

Mr. Malloy: When you agreed to sell their equipment, you would agree to transfer title to the purchaser, for how much more would you agree to install it with the equipment? 20

HENRY FINSTON recalled.

A. There is a distinction.

Mr. Malloy: When you install an oil burner, do you say to the customer I will place it on the ground for so much, or would it cover the installation and servicing during a certain period of operation. 30

A. The ordinary contract of the Jersey Appliance Company provided for the burner installed. There is no differentiation between installation or on actual cost in the selling price. 40

Henry Finston, Petitioner, Recalled—Direct.

Mr. Malloy: And then for a short time you procured the services of some other unit to do the installing?

A. That is true.

10 Mr. Harkavy: Did you bring the burner to the house where it was going to be installed?

A. Our installation man would deliver it. That is now, at the present time.

Mr. Harkavy: Has it always been that way?

20 A. As long as we have been doing that work ourselves.

Mr. Harkavy: Did you ever employ a truckman to deliver the burners?

A. No.

Mr. Harkavy: How about air-conditioning?

A. We do not do any air conditioning.

30 Mr. Harkavy: How about the installation of the oil burners, washing machines, who handles such installation?

A. We have been doing it ourselves.

Mr. Harkavy: Do you ever use outside help to do that?

A. No.

40 Mr. Malloy: Do you have a form with you covering your sales agreements?

Henry Finston, Petitioner, Recalled—Direct.

A. No, that is furnished to us by the different finance companies that we do business with.

Mr. Malloy: Do you have those forms?

A. It is all sold under F. H. A. terms, the oil burners. The other appliances are sold on the finance companies' own forms. 10

Mr. Malloy: Do you have those forms?

A. No.

Mr. Malloy: What other appliances do you sell which require installation?

A. That is all—the oil burners and the Bendix Washing Machines.

Mr. Eger: Your maintenance man, does he do the plumbing too on the washing machines? 20

A. Yes.

Mr. Eger: This maintenance concern that you had prior to that time, did they also, in addition to the work on the oil burners, did they connect the washing machines?

A. They had nothing to do with the washing machines. 30

Mr. Eger: Before you had a maintenance man, did you have to install the washing machines?

A. The washing machines were taken into our line at a later date.

Mr. Slaff: After you had a maintenance man? 40

Henry Finston, Petitioner, Recalled—Direct.

A. That is right.

Mr. Harkavy: When you started in July, 1937, did you start to sell oil burners immediately?

A. Yes.

10

Mr. Harkavy: How many were sold between then and the end of that year—1937—six months?

A. Approximately 20 or 25.

Mr. Harkavy: Who installed the burners?

A. This Essex Maintenance Company did the entire installation, up until the time they went out
20 of business.

Mr. Harkavy: They would do the digging of the pit as well as the installation?

A. Whenever outside tanks were used, they would do the entire job.

Mr. Harkavy: Who would deliver the actual burner and tank to the premises where it was going to be installed?

30

A. Well, it just would depend upon our stock—if we had enough stock at the time. We would keep some at the Essex Maintenance Company warehouse, and they would deliver the burner with our truck at the time, but if our stock was low, we would deliver right from our showroom.

Mr. Eger: Do you stock tanks or do you buy them as you need them?

40

A. We buy them as we need them.

Henry Finston, Petitioner, Recalled—Direct.

Mr. Eger: Who delivers that—the person from whom you buy the tanks?

A. Do you mean now?

Mr. Eger: As a general thing do you stock tanks?

10

A. No.

Mr. Eger: When you need them delivery was made from whomever you buy it from, is that right?

A. We would usually pick it up ourselves.

Mr. Harkavy: In other words, if your own maintenance man were installing it, he would deliver and install it, and if Essex Maintenance do it, they would pick up the tank on the way?

20

A. Yes, that is right.

Mr. Harkavy: On Jersey Coal & Supply Company, you testified that actually that business belonged to Mrs. Naidech and you, her son-in-law, and her son worked there for her. You also testified that you all use a common household. Is that right?

30

A. Yes.

Mr. Harkavy: Where do you live, what is your residence address?

A. The address?

Mr. Harkavy: Yes.

A. 111 East Centre Street, Nutley.

40

Henry Finston, Petitioner, Recalled—Direct.

Mr. Harkavy: How far is that from the coal yard or coal office?

A. About 600 feet.

10 Mr. Harkavy: Does Mrs. Naidech have any other children outside of your wife and David Naidech?

A. Yes.

Mr. Harkavy: They live there too?

A. Yes.

Mr. Harkavy: How many more?

20 A. One.

Mr. Harkavy: How old is he?

A. A daughter.

Mr. Harkavy: How old is she?

A. 24.

Mr. Harkavy: Any others been living there since 1937?

30 A. No.

Mr. Harkavy: And you further testified that Mrs. Naidech directed the policies of the organization. Who signs checks?

A. Two signatures.

Mr. Harkavy: Two signatures?

A. Yes, any two of the three partners.

40 Mr. Harkavy: As a matter of actual fact, how often would you say that Mrs. Naidech

Henry Finston, Petitioner, Recalled—Direct.

has signed any checks in the last six or seven weeks?

A. It all depends on our availability when a check is being made out.

Mr. Harkavy: Would you say that it is occasionally or usually that her signature appears on the checks. 10

A. I do not get it.

Mr. Harkavy: Is it once in a while or is it the usual situation when she signs checks?

A. I would say occasionally.

Mr. Harkavy: Mrs. Naidech does not do any actual work in connection with selling coal, does she? 20

A. No, she is a sick woman.

Mr. Harkavy: She does not do any work in the purchasing of coal?

A. Many times she would order coal.

Mr. Harkavy: But in general, she is a housewife. She runs the house and stays home with her daughter, who is your wife, and you and your brother-in-law actually run the business, don't you? 30

A. She is not a housewife in the sense that you put it. Anything that she says about the business is law as far as we are concerned.

Mr. Harkavy: You mean you respect her authority?

A. Yes. 40

Henry Finston, Petitioner, Recalled—Direct.

Mr. Harkavy: When you have to fire somebody, do you ask her if it is all right or do you do the firing? Suppose you caught one of your drivers drunk or smelling of alcohol, or both, would you fire him, or would you ask Mrs. Naidech first?

10

A. I would consult her.

Mr. Harkavy: Before you hire somebody, if you had interviewed the individual and found them fit for the purpose would you tell them all right, report for work, or would you get her permission first?

A. We usually consult her.

20

Mr. Harkavy: Mr. Linn, you have intimate knowledge of the affairs of the corporation that preceded the present organization of the New Jersey Coal & Supply Company, have you not?

Mr. Linn: Yes.

Mr. Harkavy: Do you have copies of the income tax returns filed?

Mr. Linn: Yes.

Mr. Harkavy: Are they with you?

30

Mr. Linn: No.

Mr. Harkavy: Can you recall offhand whether they reveal salaries to officers?

Mr. Linn: I do not remember.

Mr. Harkavy: I suppose if you looked at the returns you could tell?

Mr. Linn: Oh yes, of course, but I do not remember the amounts offhand.

40

Mr. Harkavy: I assume income tax returns were filed for New Jersey Coal & Supply Company in its present organization?

Henry Finston, Petitioner, Recalled—Direct.

Mr. Linn: Yes.

Mr. Harkavy: What type of returns were filed?

Mr. Linn: Partnership returns.

Mr. Harkavy: You filed the returns—the originals that were filed?

Mr. Linn: I don't remember, but as I recall, they were mailed in to the company with a letter stating that one of the partners must sign them. I do not know which one signed the returns. 10

Mr. Harkavy: Do those returns show any distribution of profits allowed?

Mr. Linn: They do.

Mr. Harkavy: Do you remember details as to any year?

Mr. Linn: I do not remember. 20

Mr. Harkavy: Have 1939 returns been completed?

Mr. Linn: Have I the 1939 returns completed?

Mr. Harkavy: Yes.

Mr. Linn: No.

Mr. Harkavy: Would you remember the ratio now in the allocation of any possible profits on those returns?

Mr. Linn: I do not recall. 30

Mr. Harkavy: But if there was a ratio for earned profits, it would be apportioned how?

Mr. Linn: It would be apportioned to each individual partner but credited to the partners capital accounts.

Mr. Harkavy: They would be?

Mr. Linn: Yes.

Mr. Harkavy: Was an income tax paid during 1939 for the calendar year 1938 40

Henry Finston, Petitioner, Recalled—Direct.

covering operations for the calendar year 1938?

10

Mr. Linn: Well, the partnership return is merely a return of information. I believe that income taxes were due, but whether they were filed I do not recall, nor if any payment was due for income tax on the returns filed by the individuals composing the partnership. I don't recall. I don't recall if anything was due or not.

Mr. Harkavy: Can both income tax returns—can they be made available for inspection?

Mr. Linn: That depends upon whether the partners wish to make them available.

20

Mr. Harkavy: Mr. Finston, will you make them available or do we have to subpoena them?

Mr. Slaff: You cannot subpoena them at a review—

Mr. Harkavy: We have not seen them.

Mr. Malloy: This is de novo.

30

Mr. Harkavy: At the time the corporation was dissolved, a partnership agreement was drawn up between yourself, your brother-in-law and mother-in-law, is that so?

Mr. Finston: Yes.

Mr. Harkavy: Do you have a copy of that agreement available today?

Mr. Finston: Yes.

Mr. Harkavy: These signatures on the bottom of this agreement (handing him agreement) they are the authorized signatures of the individuals—four parties—to the agreement?

40

Mr. Finston: That is right.

Henry Finston, Petitioner, Recalled—Direct.

Mr. Harkavy: At the time you signed it, you understood that you were to become a partner in the New Jersey Coal & Supply Company?

Mr. Finston: That is right.

Mr. Harkavy: And the other individuals understood that too, is that right?

10

Mr. Finston: Yes.

Mr. Harkavy: The date of this agreement is June 24, 1937. Thereafter, the name—the trade name of New Jersey Coal & Supply Company was registered in the County Clerk's Office in Essex as a trade name covering the operations of David Naidech, Henry Finston and Augusta Naidech, partners, trading as New Jersey Coal & Supply Company. You knew of that, did you not?

20

Mr. Finston: Yes.

Mr. Harkavy: After the signing of this agreement, a bank account or bank accounts were opened in the partnership name. You knew of that?

Mr. Finston: Yes.

Mr. Harkavy: Have any notes ever been signed—has any money been borrowed by this partnership—by the New Jersey Coal & Supply Company, for the repayment of which notes were given?

30

Mr. Finston: Yes, we have.

Mr. Harkavy: Who signed those notes?

Mr. Finston: I don't recall now.

Mr. Harkavy: All the partners or some of them?

Mr. Finston: I really don't remember.

Mr. Harkavy: In filing returns with the Federal Bureau of Internal Revenue under

40

Henry Finston, Petitioner, Recalled—Direct.

Title VIII of the Federal Social Security Act, commonly known as the Social Security Division, were the original returns filed by the employers requesting a number to be assigned in the name of the partnership?

10 Mr. Finston: Yes.

Mr. Harkavy: And all returns since then have been filed by New Jersey Coal & Supply Company as a partnership?

Mr. Finston: I cannot remember.

Mr. Linn: The business is a partnership.

20 Mr. Harkavy: The drawings of yourself and David Naidech have never been listed anywhere as a salary and a deductible item against the income of New Jersey Coal & Supply Company since this agreement was signed?

Mr. Finston: I guess so.

Mr. Linn: All moneys drawn from New Jersey Coal & Supply Company are earmarked partnership drawings and not salary.

Mr. Harkavy: Mr. Finston, did you ever take out a social security number for yourself at the time of the corporation?

30 Mr. Finston: I did.

Mr. Harkavy: Has it ever been used since the corporation was dissolved?

Mr. Finston: No.

Mr. Harkavy: Do you think that you are a partner in the New Jersey Coal & Supply Company?

Mr. Finston: As to what?

40 Mr. Harkavy: Do you think you are a partner in New Jersey Coal & Supply Company?

Henry Finston, Petitioner, Recalled—Direct.

Mr. Finston: I am to a certain extent.

Mr. Harkavy: Well, do you consider yourself to be a partner or an employee?

Mr. Finston: I consider myself a partner.

Mr. Harkavy: Do you remember having filed Form U. C. 1 for submission to this Commission, setting forth certain answers to questions concerning the status of the New Jersey Coal & Supply Company? 10

Mr. Finston: I don't recall unless I see it.

(Mr. Harkavy handed him form for inspection.)

Mr. Harkavy: Will you read what you designate your position as? (Referring to form U. C. 1.)

Mr. Finston: Partner. 20

Mr. Harkavy: Will you look over here at Form U. C. 28 (handing him form) which was filed for the company and see whose signature is there?

Mr. Finston: That is my signature.

Mr. Harkavy: And what do you set forth on this form right here (indicating) as your official position?

Mr. Finston: Partner.

Mr. Harkavy: Here is the Form U. C. 1 (showing him form) that was originally filed with this Commission by New Jersey Coal & Supply Company, Inc., it is signed by you and your title was what? 30

Mr. Finston: Secretary of the corporation.

Mr. Harkavy: Do you recall a visit that our field auditor made to where the premises of New Jersey Coal & Supply Company was to discuss status under the Un- 40

Henry Finston, Petitioner, Recalled—Direct.

employment Compensation Law of New Jersey?

Mr. Finston: Yes.

Mr. Harkavy: Did you tell him then that you were a partner of the New Jersey Coal & Supply Company?

10 Mr. Finston: Yes.

Mr. Harkavy: Did you sign this Form U. C. 27C (showing him form) which is a contribution report issued by this Commission?

Mr. Finston: Yes, I signed that.

Mr. Harkavy: What is your official position given there? (Indicating to form.)

Mr. Finston: Partner.

20 Mr. Slaff: We will concede for the sake of brevity that he is a partner in all those papers, but in name only.

Mr. Harkavy: Will you concede that David Naidech has the same status?

Mr. Slaff: In name only, yes. The only purpose of introducing the evidence in regard to what right he has to sell his interest is to get—

30 Mr. Malloy: The New Jersey Coal & Supply Company have workmen's compensation coverage?

Mr. Finston: Yes.

Mr. Malloy: How is the policy written?

Mr. Finston: For the partners as a partnership.

Mr. Malloy: Does the same apply to public liability on trucks?

Mr. Finston: Yes.

Mr. Malloy: All policies cover the partners as such?

40 Mr. Finston: Yes.

Henry Finston, Petitioner, Recalled—Direct.

Mr. Malloy: Have you any kind of a policy covering any of the executives of the business of the New Jersey Coal & Supply Company running to the individuals or covering the individuals?

Mr. Finston: No.

Mr. Malloy: Every form of insurance you carry with respect to that business runs to the New Jersey Coal & Supply Company as a partnership, is that correct? 10

Mr. Finston: Yes.

Mr. Malloy: How much time each business day does Augusta Naidech spend on the business premises?

Mr. Finston: How much time?

Mr. Malloy: Yes, how much time each business day does Augusta Naidech spend on the business premises? 20

Mr. Finston: Approximately an hour.

Mr. Malloy: What does she come in for?

Mr. Finston: Just to see what is going on.

Mr. Malloy: Well, then she comes in not for social purposes but for business purposes?

Mr. Finston: That is right.

Mr. Slaff: Now Mrs. Naidech attends the creditors' meetings, does she not, of the New Jersey Coal settlements with creditors? 30

Mr. Finston: Yes.

Mr. Slaff: And debtors?

Mr. Finston: Yes.

Mr. Slaff: Do you know what I mean? For example, if a man goes into receivership or is settling with his creditors, who would be the one to go to the creditors' meeting? Would Mrs. Naidech go to that hearing? 40

Henry Finston, Petitioner, Recalled—Direct.

Mr. Finston: We have not had any—well, we have not had anything for quite some time.

Mr. Slaff: Does Mrs. Naidech go to the office to settle mechanics' liens disputes?

Mr. Finston: Occasionally.

10 Mr. Slaff: Does she ever appear in those things?

Mr. Finston: Occasionally.

Mr. Slaff: Does she go out on disputed collections?

Mr. Finston: Yes.

Mr. Slaff: And Mrs. Naidech is more than a mere housewife—she knows this kind of business?

Mr. Finston: Yes.

20 Mr. Slaff: In other words, she is a lumber woman and knows mason supplies, cinder block and those things?

Mr. Finston: Yes.

Mr. Slaff: Where did she learn that business?

Mr. Finston: That is her business.

Mr. Slaff: Was she by her husband's side when the business was built up?

Mr. Finston: She helped to build it.

30 Mr. Slaff: She is not a domestic housewife, is that right?

Mr. Finston: Yes.

Mr. Slaff: The only handicap is that she does not write English well, is that right?

Mr. Finston: That is right.

Hearing of February 25, 1944.

File No. 18175.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY.

IN THE MATTER

of

DAVID NAIDECH and HENRY FINSTON, t/a Jersey Appliance Co.
and AUGUSTA NAIDECH, DAVID NAIDECH and HENRY FINSTON, t/a New Jersey Coal & Supply Co.,

Petitioners.

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Before HON. ERNEST EGER, Commissioner.

Present HON. DEAN H. ASHTON, Acting Secretary, Unemployment Compensation Commission of New Jersey.

Appearances:

WILLIAM HARRIS by JOSEPH H. LERNER, Esq.,
Attorney for the Petitioners.

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CHARLES A. MALLOY, Esq., Chief Counsel,
By PHILIP KESSELMAN, Esq.,
For the Unemployment Compensation
Commission of New Jersey.

A formal hearing in the above matter was held at 310 Trenton Trust Building, Trenton, New Jersey, on February 25, 1944, at one-thirty P. M.

Mr. Ashton: An application for a re-hearing

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Hearing of February 25, 1944.

and re-determination was filed in the matter of David Naidech and Henry Finston, trading as Jersey Appliance Co., and Augusta Naidech, David Naidech and Henry Finston, trading as the Jersey Coal & Supply Co.; and the Commission directed, at its meeting on January 6, 1944, that the application for re-hearing and re-determination be granted.

This re-hearing is being conducted by Hon. Ernest Eger, a member of the Commission, to whom the application for re-hearing has been referred by Hon. Joseph G. Buch, Chairman of the Commission.

Mr. Lerner: May I say, sir, that I have prepared a written memorandum on behalf of the petitioners; but I have found on my way up here that there are several facts which should be altered.

Now, I don't know whether after my oral argument you will want to read the written brief. If so, I would like to have several days in which to change the brief to conform with the testimony and with the oral argument.

Commissioner Eger: Well, suppose you make your oral argument and then we will give you time to re-write your brief and submit it, because the matter will be referred to the whole Commission eventually; and the date for the next meeting has not been set, has it?

Mr. Ashton: No, not definitely. It may be the 16th.

Commissioner Eger: It may be on the 16th. Could you possibly have your brief ready for that meeting?

Mr. Lerner: Yes. Thank you, sir.

(Discussion off the record.)

Henry Finston, Petitioner—Direct.

HENRY FINSTON, one of the petitioners, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. Lerner:

Q. Mr. Finston, where do you live? A. 119 East Center Street, Nutley, New Jersey. 10

Q. And you are a partner in the Jersey Appliance Company, are you? A. That is right.

Q. And where is their place of business? A. At 119 East Center Street, Nutley.

Q. You are also a partner of the New Jersey Coal & Supply Company, is that right? A. Now, wait a minute. That first question, was that New Jersey Coal & Supply.

Q. No. The first question was for the Jersey Appliance Company. A. That is at 529 Washington Avenue, Belleville. 20

Q. You are a partner also in the New Jersey Coal & Supply Company, is that right? A. That is right.

Q. Where is that located? A. That is at 119 East Center Street, Nutley.

Q. Now, in the Jersey Appliance Company, what other partners are there? A. Well, just two of us: David Naidech and myself.

Q. Is David Naidech available for testimony at this time? A. He is at present in the armed services. 30

Q. Now, in the partnership of the New Jersey Coal & Supply Company, who are the partners? A. Augusta Naidech, David Naidech and myself.

Q. Now, referring your attention first to the New Jersey Coal & Supply Company, will you tell us what their business is? A. Retail coal, fuel oil, lumber and building materials. 40

Henry Finston, Petitioner—Direct.

Q. And besides the partners, how many employees do they presently have? A. At present we have five.

Q. Are both partners, with the exception of David Naidech, who you say is in the Army, active in the management of this partnership? A. Yes.

Q. Do they control the employees and the finances of this partnership? A. Do you mean the New Jersey Coal & Supply?

Q. New Jersey Coal & Supply Company. A. Yes, sure.

Q. Now, how many employees have they had during the year 1943? A. 1943 we—

Q. I am now directing your attention solely to the New Jersey Coal & Supply Company. A. We have already applied for termination of coverage.

Q. On what date was that? A. That was filed January 3rd.

Q. January 3, 1943? A. 1944.

Q. Did you make any application in 1943? A. No, we did not. The only other application—we made an application in—I will go back to the years 1938 and 1939, we never had eight employees in any twenty weeks.

Q. In 1938 and 1939? A. In 1938 and 1939. Now, on November 30, 1939 we applied to the Compensation Commission for termination of coverage. And we have a reply from them on February 5th advising us that we can withhold filing any reports. But we found—

Q. Just a minute. Do you have the letter there? A. Yes.

Mr. Lerner: I want to offer this letter in evidence.

Henry Finston, Petitioner—Direct.

(Letter over the signature of W. F. Dittig, Director of Contributors' Service, above referred to, and reading as follows, received in evidence and marked Exhibit P-1:

"February 5, 1940.

"Messrs. Anthony Naidech, David Naidech & Henry Finston, t/a N. J. Coal & Supply Co., 119 East Central Street, Nutley, New Jersey.

10

"Dear Sirs: We have your application for termination of coverage. Before it can be approved, an examination of your present status and an audit of your contribution reporting for periods prior to January 1, 1940, will be necessary. Pending an audit of your records, you may withhold filing any reports for the calendar year 1940.

20

"Should the audit reveal that you are no longer subject to the law, reports for periods subsequent to December 31, 1939, will not be required. On the other hand, should we be unable to approve your application, you will be so notified and sufficient time will be allowed to bring your reports up to date.

"Meanwhile, you should continue to deduct workers' contributions from your employees' wages and hold them in trust for this Commission in the event that you remain subject for the year 1940. If your application for termination of coverage is approved, you will be able to refund to your employees any deductions you have made. If your coverage still continues, you will not have suffered any financial loss through

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Henry Finston, Petitioner—Direct.

your failure to make deductions from your workers for workers' contributions.

"Very truly yours, W. F. DITTMIG, Director of Contributors' Service.")

10 Q. Now, after that letter was received by you in 1940, what did you do, if anything? A. We found that in—for the first quarter of 1940 that it looked like we were going to be subject to the eight or more employees, and therefore we continued our contributions for that year, and we continued it up until the present. Now, I am not positive—

20 Q. Let me ask you this question: in 1940 did you actually have more than eight employees? A. In 1940 I believe we did—I don't have it broken down by the week, but in looking at our Federal reports, it looks to me that we are subject in 1940. That is the Jersey Coal & Supply Company.

Q. I am talking now of the New Jersey Coal & Supply. A. Without getting the actual breakdown, it looks to me that we are subject for 1940, 1941 and 1942.

30 Q. Yes. Now, in 1943, do you have a breakdown of your employees in 1943? A. Yes, I have the breakdown. Never in any week in 1943—in any one week did we have eight or more employees in New Jersey Coal & Supply Company.

Q. This, of course, is exclusive of partners? A. Oh, yes.

Q. May I see that? A. (Witness hands counsel copy of Form UC-1A.)

40 Mr. Lerner: I should like to have this marked for identification, Mr. Chairman, because I have some other questions on here with relation to some other figures;

Henry Finston, Petitioner—Direct.

and I will offer that in evidence in a few minutes.

(Copy of Form UC-1A, above referred to, marked P-2 for identification.)

Q. And you made application in January of this year for revocation of this provision with respect to yourself, is that right? A. That is right. 10

Q. Now, do you have a breakdown? If you wish, give us a breakdown of 1937, 1938 and 1939. A. The only breakdown I have with me is the Federal Social Security, and I could offer that. What years do you want?

Q. 1937, 1938 and 1939. A. I have 1938—

Q. And 1939? A. From 1938 on.

Q. Will you let me have 1938 and 1939? A. Yes. 20

Q. And during this period of time you say you did not have eight employees working for New Jersey Coal & Supply Company? A. We averaged five.

Q. Were you paying the contributions under the provisions of this Act with relation to subject employers? A. That is right.

Q. So you paid, although you did not in this company have eight employees? A. That is right. 30

Mr. Kesselman: For what year?

Mr. Lerner: For 1938 and 1939.

Q. Now, do you know whether in 1937 you had eight or more employees for the New Jersey Coal & Supply Company? A. I don't have the figures with me, but I am very certain we did not. You see, the only reason we became involved was from the fact the previous company was a corporation, and having four officers in the corporation that 40

Henry Finston, Petitioner—Direct.

made us a subject employer, and that is the only reason we came under the Act in the first place.

Q. And when you changed to a partnership on June 26, 1937 you were declared to be a subject employer, is that right, by the Unemployment Compensation Commission? A. Yes.

10

Mr. Lerner: Now, I wish to offer this in evidence. These are employer's tax returns under Title 8 of the Social Security Act, as proof of the number of employees during those years.

(Carbon copy of Form SS-1a for the years 1938 and 1939, above referred to, received in evidence and marked Exhibit P-3.)

20

Q. Now, I refer you to the Jersey Appliance Company. According to the previous decision rendered by this Commission, you and David Naidech, two of the partners in the New Jersey Coal & Supply Company, organized this partnership of the Jersey Appliance Company, is that correct? A. That is right.

Q. How did you finance the organization of the Jersey Appliance Company? A. It was solely my money and David Naidech's.

30

Q. Did you take any money out of the partnership? A. You mean New Jersey Coal & Supply?

Q. New Jersey Coal & Supply Company. A. No; that had nothing whatever to do with it.

Q. Did Augusta Naidech, one of the partners of the New Jersey Coal & Supply Company, have any interest in the Jersey Appliance Company? A. None whatsoever. Never did and never has.

40

Q. Did she lend you any money for the organization of that company? A. No.

Henry Finston, Petitioner—Direct.

Q. Did she direct the activities of its employees? A. No.

Q. Did she participate in its management? A. No.

Q. Did she control it in any way at any time? A. None whatever.

Q. What type of business did the Jersey Appliance Company engage in? A. Retail sale of electric appliances such as washing machines, refrigerators, oil burners, radios, and things like that. 10

Q. And is there any domination or influence on the part of the New Jersey Coal & Supply Company over and with respect to the Jersey Appliance Company? A. None whatsoever.

Q. How many employees did the Jersey Appliance Company have in 1937? A. I don't have the copy of 1937. 20

Q. What is your best recollection with respect to that? A. I think it was around three or four.

Q. And how many did they have in 1938? A. I would say an average of six.

Q. This is the Jersey Appliance Company? A. That is right.

Q. And how many in 1939? A. An average of seven.

Q. And how many in 1940? A. An average of six. 30

Q. How many in 1941? A. An average of six also.

Q. And in 1942? A. An average of three.

Q. And in 1943? A. Well, in 1943 it was just one and two.

Q. And is that reflected on P-2 for identification? A. That is right.

Mr. Lerner: Now, I wish to offer this in evidence, Mr. Commissioner. 40

Henry Finston, Petitioner—Direct.

Mr. Kesselman: Did you furnish the original of this to the Unemployment Compensation Commission?

The Witness: Yes; that is our copy.

Mr. Lerner: Of course, Mr. Kesselman, if you offer the original in evidence——

10 Mr. Kesselman: I just want to compare it. All right, no objection.

(Copy of Form UC-1A, heretofore marked P-2 for identification, received in evidence and marked Exhibit P-2.)

Q. So that the business of the Jersey Appliance Company was carried on by you as an altogether separate business unit, is that right? A. That is right.

20 Q. Was the management of the Jersey Appliance Company in any way connected with the management of the Jersey Coal & Supply Company? A. There was no connection in the management. I was always at the New Jersey Coal & Supply Company most of my time. In fact, about ninety per cent of my time is spent at the Jersey Coal & Supply Company.

30 Q. And so far as the other ten per cent of your time was concerned, I assumed you devoted that to the Jersey Appliance Company? A. That is right.

Q. And, of course, as you stated before, Augusta Naidech spent, I assume, one hundred per cent of her time at the New Jersey Coal & Supply Company? A. That is right.

40 Q. How about the books of the two companies, were they separate from each other? A. Oh, definitely. There is two separate, individual companies, always was. We have different bank accounts in different banks. We have different Com-

Henry Finston, Petitioner—Cross.

pensation Insurance policies. The identity is no way related whatsoever, except David Naidach—

Q. Except you happen to be one of the partners in both of these units, is that it? A. That is it.

Q. When were you first informed that you were subject to the provisions of Section 19(h)(2) of this Act for the Jersey Appliance Company? A. You mean this last? 10

Q. Well, let me reframe that question. Did you ever make any contributions for the Jersey Appliance Company since its organization? A. No.

Q. In other words, as I understand it, the first adjudication that the Jersey Appliance Company would be a subject employer was as a result of the decision by this Commission on June 23, 1943, is that right? A. That is right. 20

Mr. Lerner: I wish to offer this in evidence, Mr. Commissioner, to corroborate the testimony, employer's tax return under Title 8 of Social Security with respect to the number of employees from 1938 through 1942.

(Carbon copies of Form SS-1a, above referred to, for the years 1938 to 1942 inclusive, received in evidence and marked Exhibit P-4.) 30

Mr. Lerner: That, sir, is our case.

Cross examination by Mr. Kesselman:

Q. Mr. Finston, were you an officer in the New Jersey Coal & Supply Company, Inc.? A. Yes.

Q. When was that corporation first organized? A. I am not sure; I think it was in 1931.

Q. It, however, did exist in the year 1936? A. It did, yes. 40

Henry Finston, Petitioner—Cross.

Q. What was the nature of its business? A. The same as the present organization; just a change in ownership.

Q. Will you state specifically the nature of its business? A. Retail coal, oil, lumber and building material.

10 Q. Who were the officers of that corporation? A. Augusta Naidech is president, David Naidech is vice-president, Henry Finston secretary and Ida Finston treasurer.

Q. And where was that corporation doing business? A. At 119 East Center Street, in Nutley.

Q. And who were the stockholders in 1936? A. Augusta Naidech—

Q. Were they the same as the officers? A. That is right.

20 Q. Now, when did that corporation cease doing business? A. I don't have the dates available. I believe it was in June, 1937, something like that.

Mr. Lerner: We are willing to stipulate, Mr. Kesselman, that it is June 26, 1937 according to the findings in the decision.

Mr. Kesselman: I see.

30 Q. Now, did that corporation, during the year 1936, have sufficient employees to come within the taxing provisions of the Unemployment Compensation Law? A. No.

Q. Did it have sufficient employees—I am speaking of the corporation, now—within the year 1937, to come within the taxing provisions of the Unemployment Compensation Law? A. I wouldn't be sure of that. I don't have records available.

40 Q. I show you Form UC-1A for the year 1936 for the New Jersey Coal & Supply Company, Inc., and ask you whether that is your signature on that

Henry Finston, Petitioner—Cross.

form? A. That is my signature all right, but this is including the four officers.

Mr. Kesselman: I offer this in evidence.

Mr. Lerner: May I see that?

Mr. Kesselman: Yes, (handing original of Form UC-1A for the year 1936 to Mr. Lerner).

10

(Form UC-1A for the year 1936 for the New Jersey Coal & Supply Company, Inc., above referred to, received in evidence and marked Exhibit C-1.)

Q. Now, following June, 1937 when it is stated the corporation ceased doing business, what happened to the business of the corporation? A. It was sold to the partnership.

20

Q. To the partnership of Augusta Naidech, David Naidech and Henry Finston? A. That is right.

Q. And were all the assets that the corporation then had transferred to the partnership? A. That is right.

Q. And the nature of the business and the manner of the business and the personnel of the business were also similarly transferred? A. That is right.

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Q. So that to all intents and purposes the same business as was formerly conducted by the corporation was, subsequent to June, 1937, conducted by the partnership? A. That is right.

Q. Now, after the partnership began to operate the business of the Coal & Supply Company, did it have in its employ for any year commencing with June, 1937 to date, eight employees for twenty weeks during the year? A. I don't have the breakdown with me, but it appears to me from glancing through our Social Security reports,

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Henry Finston, Petitioner—Cross.

that we would be subject for the years 1940, 1941 and 1942. Now, the only thing that would prove that would be an audit.

10 Q. Now, when you say that you would be subject for those years, you mean that the partnership had in its employ at least eight employees for a portion of a day for twenty weeks during the years mentioned, namely, 1940, 1941 and 1942? A. That is right.

Q. But for the year 1937, from the time the partnership took over, to date, exclusive of the years 1940, 1941 and 1942, is it a fact that the partnership of the New Jersey Coal & Supply Company did not have the necessary employees to make it subject to the law? A. That is right.

20 Q. Now, when was the first request for termination made in behalf of the New Jersey Coal & Supply Company, the partnership? A. The first request was made on November 30, 1939.

Q. Requesting termination, I take it as of January 1, 1940? A. Well, in our letter requesting that we said that we did not have eight workers for any twenty days occurring in twenty different calendar weeks in each of the years 1938 and 1939.

Q. Did you receive a response to that letter? A. Yes, we did.

30 Q. What was the answer? The answer is the letter of February 5, 1940 now in evidence? A. That is right.

Q. Did you ever get any communication other than the letter of February 5, 1940 with respect to the application for termination? A. Nothing in that respect; nothing at all. You see, we voluntarily continued our payments after that.

40 Q. Now, with respect to the partnership of the Jersey Appliance Company, when was that organized? A. I believe it was organized in 1937.

Henry Finston, Petitioner—Re-direct.

Mr. Lerner: We will stipulate it was July 1, 1937.

Q. And where did the Jersey Appliance Company operate its business? A. At that time they were at 272 Washington Avenue, Belleville.

Q. Now, you indicated that you furnished ten per cent of your time in the conduct of the business of the Jersey Appliance Company? A. That is right. 10

Q. Has that been since its inception? A. Well, it would vary with the demand. At the present time that is true.

Q. In other words, do I understand you to say if ninety per cent of your time was needed you would furnish ninety per cent of your time to the Jersey Appliance Company? A. Yes. It all varied with the conditions. To make that a little clearer to you— 20

Q. The fact of the matter is, that with respect to the conduct of the business of the Jersey Appliance Company since its inception, the direction of that business has been in the hands of either yourself or Mr. David Naidech? A. That is right.

Q. And each of you would furnish whatever time was necessary in the conduct and the operation of that business? A. That is right. 30

Mr. Kesselman: That is all.

Re-direct examination by Mr. Lerner:

Q. And the fact is, Augusta Naidech had nothing to do with the Jersey Appliance Company, is that right? A. That is right.

Q. And there was no agreement in the partnership agreement between you, Augusta Naidech and David Naidech that you were required to 40

Henry Finston, Petitioner—Re-cross.

spend either forty, fifty or ninety per cent of your time in the operation of the New Jersey Coal & Supply business? A. None whatsoever.

Mr. Lerner: That is all.

Re-cross examination by Mr. Kesselman:

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Q. The business of the New Jersey Coal & Supply Company was in whose hands? A. All three partners.

Q. And that since 1937 to date? A. That is right.

Mr. Kesselman: That is all.

Mr. Lerner: That is our case, your Honor. Do you have any witnesses, Mr. Kesselman?

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Mr. Kesselman: No.

Mr. Lerner: May I proceed with oral argument?

Commissioner Eger: Yes. Go right ahead.

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Mr. Lerner: I think your Honor is very familiar with the facts, because the basic facts have now been brought out in this testimony. And I appreciate the opportunity of giving this testimony now, because it makes our situation that much clearer than if we had to depend on testimony taken a year ago.

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The fact is that the New Jersey Coal & Supply Company is a partnership consisting of three individuals, all three of them operating the business. As a matter of fact, according to the testimony and the evidence that was brought out in the last hearing, Augusta Naidech owned a substantial share of the partnership. I think

Argument.

she had an eighty per cent interest in that partnership, and the other two partners owned correspondingly lesser shares. It was after this partnership had been in existence for some time—in fact, the business of the New Jersey Coal & Supply Company had been in business for a great number of years before the Jersey Appliance Company was conceived; that the Jersey Appliance Company was conceived by two of the partners of the other partnership in the same way as if two partners of a partnership consisting of fifty partners would conceive of an idea of organizing a business on the side for an altogether different purpose, without any connection, without any control or without any claim of ownership by the original partnership. 10

And that has happened in this case: the Jersey Appliance Company organized a partnership for the selling of not coal or mill supplies, but for the selling of merchandise such as refrigerators, for the sale of washing machines, for the sale of other electrical appliances. As a matter of fact, they organized in a different city. It was a type of business that did not require too much time. At one time before the war there were more refrigerators sold. Since the inception of the war, of course, as your Honor knows, there are no refrigerators on the market and there are no washing machines on the market. And the business is actually being kept up now just—they are marking time until after the end of the war. At that time they hope that the business will be a big one. Right now there 20 30 40

Argument.

just aren't any electrical appliances being sold. But they do some repair work and they manage to get a few items, and they keep a few employees.

10 Now, our contention, is, first, that the two partnerships are separate and distinct units having no connection with each other; not controlled by either one of them, and therefore, must be considered as a unit.

We say this, that a partnership that has three partners is different from a partnership with the two partners. In other words, B and C organize the A partnership, is altogether different under the contemplation of this Act than A and B organizing the Y partnership, because the partnership entity is different than the corporate entity. A corporate entity is a unit, and we know that it is a creature of statute; but the partnership entity is an altogether different creature.

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It is true that for the purpose of benefits each partner in a partnership is considered to be an employer; but in order to consider the partnership itself you cannot divide the integral parts of the partnership. In other words, you cannot say, if I instead of suing the partnership want to sue A of the partnership because I do not like him or I want to give a special benefit to B of the partnership because he is a favorite of mine—you cannot divide the partnership for the purposes of considering it as a unit, a partnership as a unit; it is an all integrated unit within itself, and as a unit is considered an employer unit under the Act. It has been so

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Argument.

held in the case of *In re Williams*, 29 Federal Cases, Number 17707, where the Court said that a partnership is an entity distinct from its component members, and unless it can be shown that the identical members of the partnership operating under the corporate name—under the partnership name, control the two businesses, they must be considered separate entities for the purpose of this Act. 10

Our contention is that A and B, who operated the Jersey Appliance Company, are not the same entity, it is not the same entity that operates the New Jersey Coal & Supply Company.

The testimony here is very clear that Augusta Naidech is one of the leading partners of the New Jersey Coal & Supply Company. She forms the unit. She forms the operating unit, the controlling unit of New Jersey Coal & Supply Company. The unit, the composite of the two partners that went into the Jersey Appliance Company cannot be considered the same unit that is operating the New Jersey Coal & Supply Company. 20

And we say for that reason it cannot be held that A, B and C, Augusta Naidech, David Naidech and Mr. Finston, trading as the partnership known as the New Jersey Coal & Supply Company, control and direct the activities of Henry Finston and David Naidech, trading as the Jersey Appliance Company. 30

And the proof is further that Augusta Naidech had nothing to do with the Jersey Appliance Company; she neither put in 40

Argument.

10 any money, she neither loaned them any money, she has no financial interest in Jersey Appliance Company; she doesn't direct its activities; she has no right to employ or discharge employees of the Jersey Appliance Company, which is one of the evidences on the employer-employee relationship, and she has nothing to do with the partnership itself. And for that reason we respectfully submit that the same partnership does not control and direct the activities of these two units; that they are altogether different units developed, composed in a different way, and one has no control or direction over the other.

20 And as I stated before, the mere fact that two partners of a partnership come out and organize another partnership does not in itself mean that one partnership controls and directs the other partnership. They must be considered as separate entities.

30 And as I stated, suppose a partnership consisted for forty partners, and one partner or two partners decide to go out and organize a side line without any reference to the partnership that had forty partners—or, to carry it to its logical extreme we could even have a hundred partners—certainly it cannot be said that these two partners going out, using their own money, not using partnership funds, having no connection with it, keeping separate books of account, preparing separate returns, having complete control over their employees without relation to the other partners. We cannot say because these two partners that

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Argument.

remain of the forty partners came out and organized their own business, that the other partnership is going to be considered as controlling this partnership, and therefore, this partnership should be penalized by being made subject to the provisions of the Act.

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I bring out this logical extreme because I think it makes the picture particularly clear that unless you have the identical unit, as In re Williams held, that you must have the identical unit controlling the operations of both.

It is different in the case of a corporation and it is different in the case of a single employer because you have the identical unit; but a partnership differs from those because a partnership may consist of one or two partners just as well as it may consist of two hundred or more. And, in fact, the cases have held, in one case, that a subject organization may take in partners and have eight or ten or fifteen partners in order so that they will not be subject to the provisions of the Act with respect to subject employers. And that has been done in a number of cases. But the difference between a partnership is that a partnership is considered in its entirety. And if one partner should die of a partnership, the entire partnership is dissolved, because a partnership of three is different than a partnership of two. Likewise, when you take in from a partnership of three another partner, you have to develop another partnership agreement, because you cannot just fit into a partnership as you can fit into a corpora-

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Argument.

tion by adding another director or a couple of more stockholders.

A partnership is considered an entity by virtue of the contract of partnership. The original contract of partnership must prevail as to the nature of that entity. That is our first point.

Therefore, we come to point number two, that since these are separate entities and since the Jersey Appliance Company has never had any more than eight employees, it cannot be considered a subject employer under this Act.

With respect to the New Jersey Coal & Supply Company we, of course, state that while it is true, as it was testified, that the assets were taken over by the partnership, nevertheless, the corporation dissolved. The business is a new business; and this business was immediately subjected to the provisions of this Act without any audit by this Commission to determine whether or not it was subject to it.

And we said that unless there was a proper audit or an adjudication by this Commission after the notice of determination of its subjection under the provisions of this Act, that until we received the definite adjudication by the Commission we are entitled to refunds under this Act.

Now, we say this, that these two companies, of course, cannot be considered as having more than eight employees merely because the partners were employees. I do not think I have to labor that point. I am sure Mr. Kesselman will agree with me that the decisions throughout the country are

Argument.

uniform in stating that a partner is considered an employer, not an employee, for the purposes of taxing provisions. That is distinct from the first point I made that it is true that the partner is considered an employer; but when you consider the partnership for the purposes of this provision of the Act, you must consider it a partnership as an entity. 10

It is very true you cannot consider the individual partners as employees, but they must be considered as employers under the Act. Yet for the purpose of determining whether one is controlled by the other, you must consider the entire partnership in its entirety as a unit.

For these reasons we respectfully submit, in the first place, the New Jersey Coal & Supply Company is not a subject employer or, that since it has filed its notice of revocation that it should be adjudicated as of this date as not a subject employer because of the record of its employees during the year 1943 considered individually and considered separately and apart from the Jersey Appliance Company. 20

So we contend, first of all, we are entitled to a return of contributions since 1937; and if the Commission should find that we are not entitled to that, we secondly submit that we are entitled to an adjudication as of this date that we are no longer subject to the provisions of this Act; and thirdly, we submit that the Jersey Appliance Company has at no time been subject to the provisions of this Act; that the Jersey Appliance Company is a separate unit; the Jer- 30 40

Argument.

sey Appliance Company has never been controlled or dominated or directed by the New Jersey Coal & Supply Company since its organization as a partnership in 1937, and that there should therefore be an adjudication by this Commission that the Jersey Appliance Company is not subject to the provisions of this Act, and that the Commission should reverse the decision in that respect made by it on June 25, 1943.

10 Commissioner Eger: Do you intend to supplement this oral argument with a brief?

Mr. Lerner: Yes, I should like to submit a short memorandum merely on that one point, unless Mr. Kesselman on behalf of the Commission urges the other point which I have not stressed with respect to the interpretation of what a partner is. I mean, I did not know whether he was seriously going to contend that a partner is going to be considered an employee for the purposes of contributions. If that is the case, then I have several citations here and would include that in my brief.

20 Mr. Kesselman: Commissioner, I shall rely upon the propriety of the decision made by the Commission with respect to the status of the petitioners, and do not see fit to answer counsel at this time.

30 (Memorandum to be submitted by counsel for the petitioners.)

Exhibit P-2.

40 (Opposite )

UNEMPLOYMENT COMPENSATION COMMISSION

SUPPLEMENT TO STATUS REPORT OF EMPLOYING UNIT

FOR CALENDAR YEAR 1943

NAME AND ADDRESS OF EMPLOYING UNIT:

Mess. Anthony Nardese,
David Nardese & Henry
Janssen T/A New Jersey
Coal Supply Co
119 East Center St
Nutley, N.J. 18175-1

The original of this report must be returned to the Unemployment Compensation Commission within ten days from the receipt thereof by the employing unit, whether or not exemption from liability for contributions under the Unemployment Compensation Law of New Jersey is claimed.

READ THE FOLLOWING INSTRUCTIONS CAREFULLY BEFORE FILLING OUT THIS FORM

For the purpose of this report, "week" means any calendar week included in whole or in part in the year 1943. For each week of the year 1943, enter the largest number of employees on any one day during the week. This figure should be the total number of all the different individuals employed during the day.

Include in the number of employees:

- (A) All employees, regular, temporary, and casual (including salaried and commission salesmen);
- (B) Corporation Officers engaged in the activities of the enterprise or receiving remuneration;
- (C) Employees of any contractor or subcontractor engaged by you in employment which is part of your usual trade, occupation, profession, or business, while performing services under such contract or engagement;
- (D) The employees (including officers) of any other employing unit owned or controlled by this employing unit, or owned or controlled by the same interests as this employing unit;
- (E) The individuals employed during the year by any other employing unit prior to its acquisition by this employing unit in 1943.

After entering the number of employees for each week, commence with the first week and determine the twentieth week in which eight or more persons were in employment. This is the week in which you became a subject employer. Take the twentieth week and, in Item 3 below, enter the actual number of persons in employment on each day of this week. The first day of this twentieth week in which you had eight or more individuals in covered employment is the day on which you became a subject employer. The employer's contributions are payable with respect to employment from the first day of the calendar year in which he became subject to the law.

1. Largest number of employees on any day of each week of 1943.

Week Ended	(A) Regular Employees	(B) Officers engaged in the activities of the enterprise or receiving remuneration	(C) Employees of contractors or sub-contractors	(D) Employees of related unit or units	(E) Employees of acquired units	TOTAL	Week Ended	(A) Regular Employees	(B) Officers engaged in the activities of the enterprise or receiving remuneration	(C) Employees of contractors or sub-contractors	(D) Employees of related unit or units	(E) Employees of acquired units	TOTAL
Jan. 2							Jul. 3	4			2		6
Jan. 9	6			1		7	Jul. 10	4			1		5
Jan. 16	6			2		8	Jul. 17	4			1		5
Jan. 23	6			1		7	Jul. 24	4			1		5
Jan. 30	6			1		7	Jul. 31	6			1		7
Feb. 6	6			1		7	Aug. 7	5			1		6
Feb. 13	6			2		8	Aug. 14	5			1		6
Feb. 20	6			1		7	Aug. 21	4			2		6
Feb. 27	5			1		6	Aug. 28	5			2		7
Mar. 6	5			2		7	Sep. 4	6			1		7
Mar. 13	5			1		6	Sep. 11	6			1		7
Mar. 20	5			1		6	Sep. 18	6			1		7
Mar. 27	5			2		7	Sep. 25	7			1		8
Apr. 3	5			1		6	Oct. 2	6			1		7
Apr. 10	5			1		6	Oct. 9	7			2		8
Apr. 17	5			1		6	Oct. 16	7			2		9
Apr. 24	5			2		7	Oct. 23	7			1		8
May 1	5			2		7	Oct. 30	7			1		8
May 8	5			2		7	Nov. 6	7			1		8
May 15	4			2		6	Nov. 13	7			1		8
May 22	4			1		5	Nov. 20	7			1		8
May 29	4			1		5	Nov. 27	7			1		8
Jun. 5	4			1		5	Dec. 4	7			2		9
Jun. 12	4			2		6	Dec. 11	6			1		7
Jun. 19	4			1		5	Dec. 18	7			1		8
Jun. 26	4			1		5	Dec. 25	5			2		7
							Dec. 31	7			1		8

2. Date of beginning of twentieth week in which eight or more persons were employed in any one day.

None

3. Actual number of employees on each day of the twentieth week in which eight or more persons were employed during any one day:

Day	No. of Workers	Day	No. of Workers	Day	No. of Workers	Day	No. of Workers
Sunday		Monday		Wednesday		Friday	
		Tuesday		Thursday		Saturday	

(over)

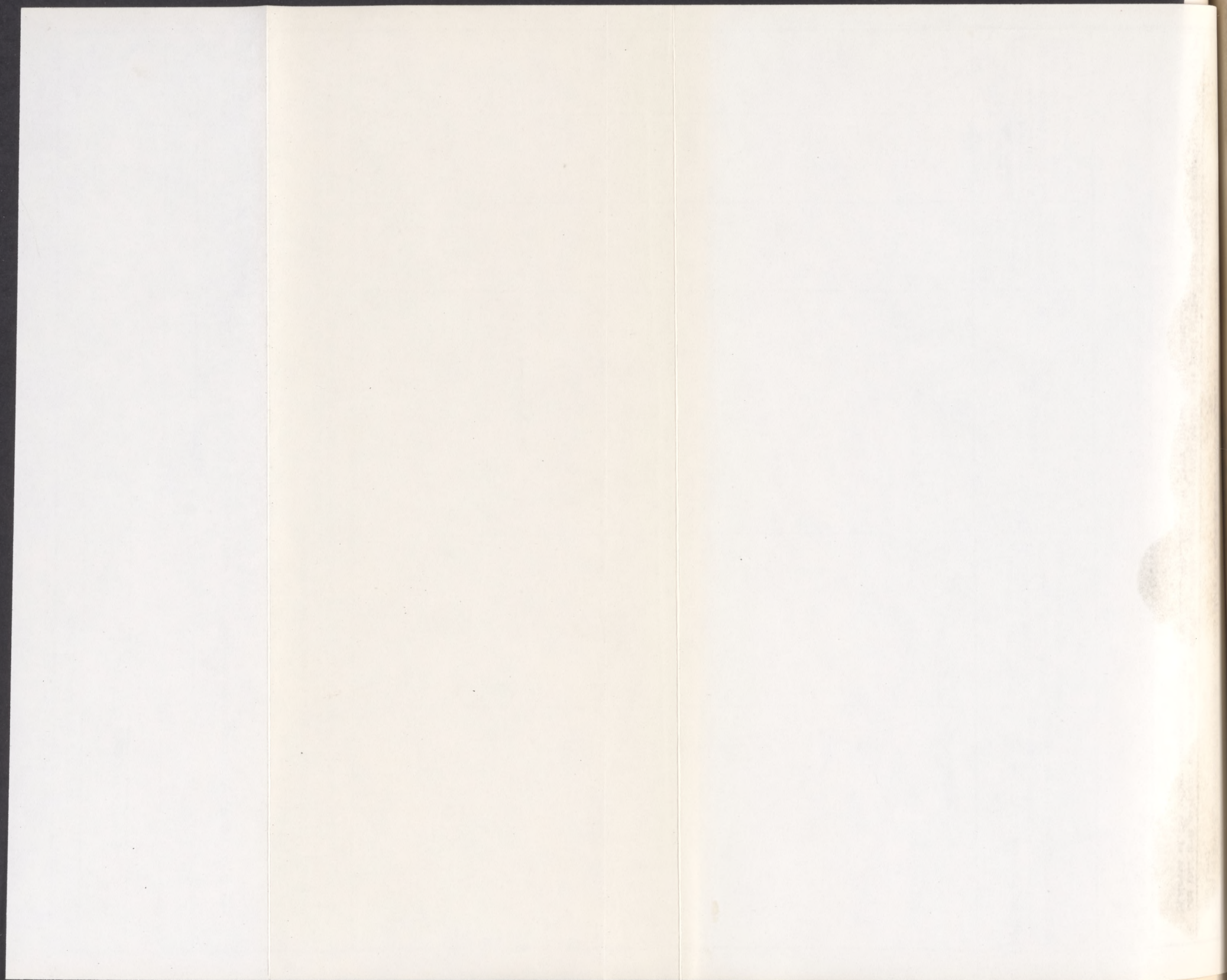


Exhibit C-1.
(Opposite E-7)

Exhibit C-1.

(*Opposite* )

The original of this report must be returned to the Unemployment Compensation Commission within ten days from the receipt thereof by the employing unit, whether or not exemption from liability for contributions under the Unemployment Compensation Law of New Jersey is claimed.

Form No. U. C. 1A
(revised April 20, 1939)
STATE OF NEW JERSEY

UNEMPLOYMENT COMPENSATION
COMMISSION
SUPPLEMENT TO STATUS REPORT
OF EMPLOYING UNIT
For Calendar Year 1936

NAME AND ADDRESS OF EMPLOYING UNIT:

New Jersey Coal & Supply
Company Inc.
119 East Central Street
Hutley, N.J.

READ THE FOLLOWING INSTRUCTIONS CAREFULLY BEFORE FILLING OUT THIS FORM

For the purpose of this report, "week" means any calendar week included in whole or in part in the year 1936.
For each week of the year 1936, enter the largest number of employees on any one day during the week. This figure should be the total number of all the different individuals employed during the day.

Include in the number of employees:

- (A) All employees, regular, temporary, and casual (including salaried and commission salesmen);
- (B) Officers of a corporation whether or not they receive remuneration or perform services;
- (C) Employers of any contractor or subcontractor engaged by you in employment which is part of your usual trade, occupation, profession, or business, while performing services under such contract or engagement;
- (D) The employees (including officers) of any other employing unit owned or controlled by this employing unit, or owned or controlled by the same interests as this employing unit;
- (E) The individuals employed during the year by any other employing unit prior to its acquisition by this employing unit in 1936.

After entering the number of employees for each week, commence with the first week and determine the twentieth week in which eight or more persons were in employment. This is the week in which you became a subject employer. Take the twentieth week and, in Item 3 below, enter the actual number of persons in employment on each day of this week. The first day of this twentieth week in which you had eight or more individuals in covered employment is the day on which you became a subject employer. The employer's contributions are payable with respect to employment from the first day of the calendar year in which he became subject to the law.

1. Largest number of employees on any day of each week of 1936.

Week Ended	(A) Regular Employees	(B) All Officers whether or not receiving remuneration or performing services	(C) Employees of contractors or sub-contractors	(D) Employees of related unit or units	(E) Employees of acquired units	TOTAL	Week Ended	(A) Regular Employees	(B) All Officers whether or not receiving remuneration or performing services	(C) Employees of contractors or sub-contractors	(D) Employees of related unit or units	(E) Employees of acquired units	TOTAL
JAN. 4	9						JULY 4	9					
JAN. 11	9						JULY 11	9					
JAN. 18	9						JULY 18	9					
JAN. 25	9						JULY 25	9					
FEB. 1	9						AUG. 1	9					
FEB. 8	10						AUG. 8	9					
FEB. 15	9						AUG. 15	9					
FEB. 22	9						AUG. 22	9					
FEB. 29	9						AUG. 29	9					
MAR. 7	9						SEPT. 5	9					
MAR. 14	9						SEPT. 12	9					
MAR. 21	9						SEPT. 19	9					
MAR. 28	9						SEPT. 26	9					
APR. 4	9						OCT. 3	9					
APR. 11	9						OCT. 10	9					
APR. 18	9						OCT. 17	9					
APR. 25	9						OCT. 24	9					
MAY 2	9						OCT. 31	9					
MAY 9	9						NOV. 7	9					
MAY 16	9						NOV. 14	9					
MAY 23	9						NOV. 21	9					
MAY 30	9						NOV. 28	9					
JUNE 6	9						DEC. 5	9					
JUNE 13	9						DEC. 12	9					
JUNE 20	9						DEC. 19	9					
JUNE 27	9						DEC. 26	9					
							DEC. 31	9					

2. Date of beginning of twentieth week in which eight or more persons were employed in any one day. May 10, 1936.

3. Actual number of employees on each day of the twentieth week in which eight or more persons were employed during any one day:

Day	No. of Workers	Day	No. of Workers	Day	No. of Workers	Day	No. of Workers
Sunday		Monday	9	Wednesday	9	Friday	9
		Tuesday	9	Thursday	9	Saturday	9

(OVER)

4. Date of first day in twentieth week on which eight or more persons were employed (this is the date the employer became subject to the Law). 7 12-1-66

5. Did this unit perform any service or work for another employing unit which was part of the usual trade, occupation, profession or business of the other employing unit? Yes..... No...☒... If "yes" please fill in Schedule 7 in detail.

6. If employees of a related unit or acquired unit have been included in Schedule 1, please fill in Schedule 7 in detail.

7. Name of employing unit for whom services were rendered; related unit or acquired unit.	Relationship (Enter "Employing unit," "Related unit" or "Acquired unit" as the case may be).	Mailing Address	Unemployment Compensation registration number if any.	To be filled in only for each employing unit for whom services were rendered whether or not subject employers.	
				Number of weeks of service.	Average weekly number of employees.
				This year.	This year.

The following affidavit must be executed by (1) the person who owns the business if the owner is an individual; (2) the president, treasurer, or other principal officer if the employing unit is a corporation; or (3) a responsible or duly authorized member having knowledge of the affairs, if the employing unit is a partnership or other unincorporated organization.

State of New Jersey

County of _____

$$\left. \begin{array}{l} \text{ } \\ \text{ } \end{array} \right\} \text{SS.}$$

I swear (or affirm) that the statements contained in this report are true and correct in every respect.

Subscribed and sworn before me this 17th

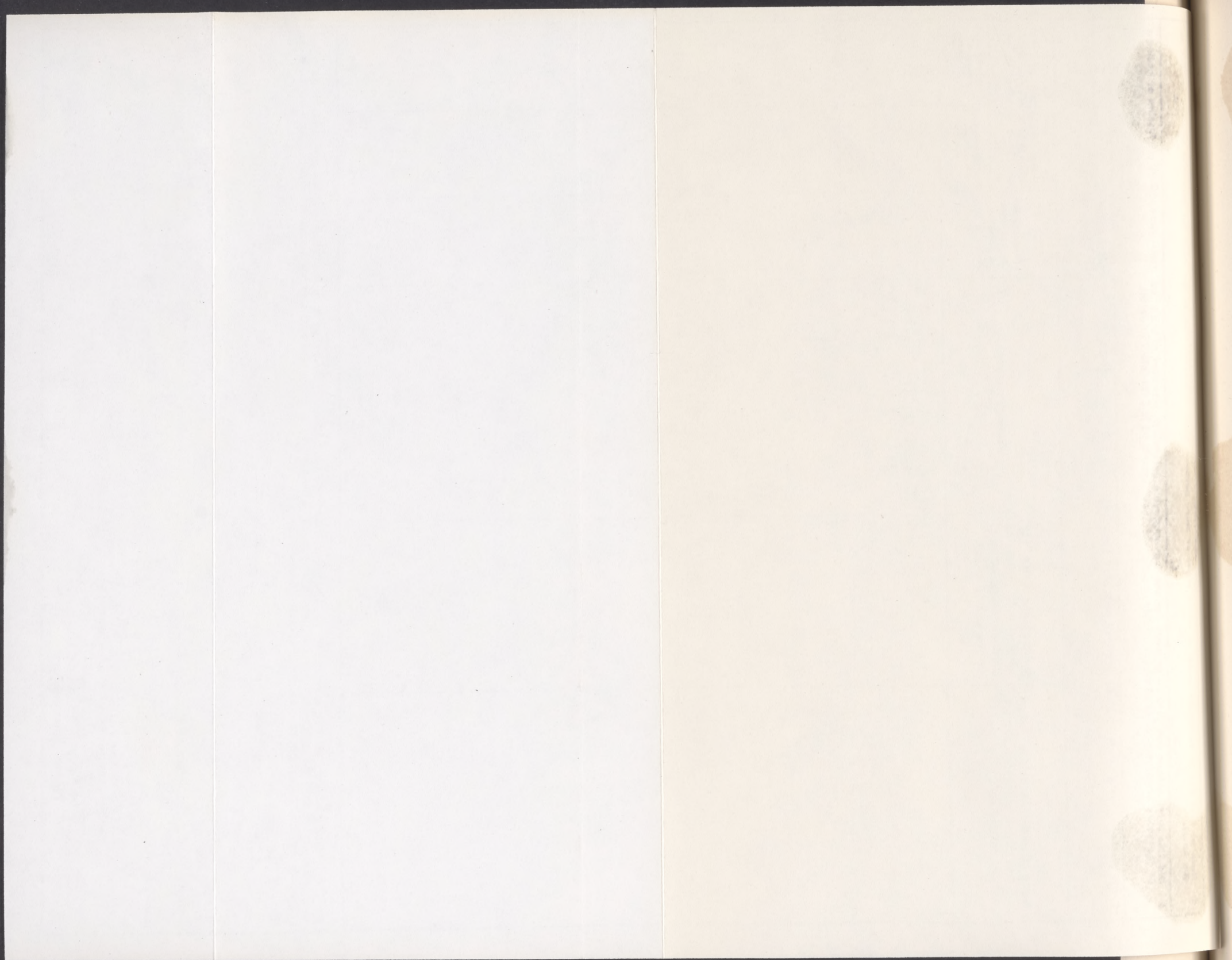
Signature Henry C. Jurek

day of July 1939

Title Secretary

Signature of Officer Administering Oath

Title of Officer Administering Oath



Decision.

EMPLOYMENT COMPENSATION
COMMISSION OF NEW JERSEY

IN THE MATTER

HARRY FINESTON & DAVID N. AINBACH
vs.
THE NEW JERSEY COAL & SUPPLY CO.

Attorneys: N. AINBACH, DAVID N. AINBACH
& HARRY FINESTON, vs. NEW
JERSEY COAL & SUPPLY CO. and
NEW JERSEY COAL & SUPPLY
CO., INC.

Petitioner

Findings of Fact

The New Jersey Coal & Supply Co., Inc. is
a subject corporation as of January 1, 1933
and operated until June 30, 1937, when it dis-
solved. The stockholders of the corporation,
Augusta N. Aibach, David N. Aibach and Harry
Fineston, formed a partnership under the trade
name of New Jersey Coal & Supply Company.
Augusta N. Aibach had owned 16 out of 20 shares
of stock of the corporation and she held an 80%
interest in the partnership. This partnership on
June 30, 1937 became a subject corporation under
the provisions of Section 101(1)(2).

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IN THE MATTER
of
HENRY FINSTON & DAVID NAIDECH,
t/a JERSEY APPLIANCE Co.,
and
AUGUSTA NAIDECH, DAVID NAIDECH
& HENRY FINSTON, t/a NEW
JERSEY COAL & SUPPLY Co. and
NEW JERSEY COAL & SUPPLY
Co., INC.,
Petitioner.

30

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Decision.

On July 1, 1937, Henry Finston and David Naidech, two of the partners in the above New Jersey Coal & Supply Company organized another partnership under the trade name of Jersey Appliance Company. The latter partnership has not employed as many as eight individuals.

Since Augusta Naidech, David Naidech and Henry Finston, t/a New Jersey Coal & Supply Company are subject employers, the partners, David Naidech and Henry Finston, when they formed the firm of Jersey Appliance Company, became liable for contributions for wages payable to employees of that new firm. By reason of the fact that each partner is the employer of the individuals working for the partnership, when they became subject employers because of their association with the New Jersey Coal and Supply Company any additional workers they might or did have thereafter because of their relationship with the Jersey Appliance Company are merely treated as additional employment by an already subject employer.

Decision.

David Naidech and Henry Finston, t/a Jersey Appliance Company, are subject employers and liable for contributions and reports on all wages payable by them since July 1, 1937.

UNEMPLOYMENT COMPENSATION
COMMISSION OF NEW JERSEY

By JOSEPH G. BUCH (Signed)

Joseph G. Buch

Chairman

Attest:

WILLIAM S. CONKLIN (Signed)

William S. Conklin

Secretary to the Commission

Dated: June 25, 1943.

Decision on Rehearing.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY.

IN THE MATTER

10

of

HENRY FINSTON and DAVID NAID-
DECH T/A JERSEY APPLIANCE
Co.

AUGUSTA NAIDECH, DAVID NAIDECH
and HENRY FINSTON, T/A
NEW JERSEY COAL & SUPPLY
Co. and NEW JERSEY COAL &
SUPPLY Co., Inc.,

20

Petitioner.

Decision on
Rehearing.

This matter coming before the Commission on
an application for a rehearing and redetermina-
tion and the matter having been reheard on Feb-
ruary 25, 1944, at which time testimony was given,
and the Commission having reconsidered the com-
plete record, the brief submitted by the petition-
er's attorney, and all exhibits, the Commission
30 finds that there are no new facts nor evidence in-
troduced which will change the decision hereto-
fore made by this Commission on June 17, 1943.

The Commission, therefore, rules that the de-
cision of June 17, 1943, is reaffirmed, this action
being taken at a formal session of the Unemploy-

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Decision on Rehearing.

ment Compensation Commission of New Jersey on
Thursday, the fourth day of May, 1944.

JOHN J. TOOHEY, JR.,
Vice-Chairman of the Commission.

Commissioners Concurring: 10

Harry G. Roebeling,
J. Albert Homan,
Charles Engelhard,
Vincent J. Murphy,
Ernest Eger.

Attest:

(Seal)

DEAN H. ASHTON, 20
Acting Secretary to the Commission.

Dated: May 12, 1944.

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Reasons.**NEW JERSEY SUPREME COURT.**

10 AUGUSTA NAIDECH, DAVID NAIDECH
and HENRY FINSTON, t/a NEW
JERSEY COAL & SUPPLY Co., a
partnership and HENRY FINSTON
and DAVID NAIDECH t/a
JERSEY APPLIANCE Co., a partnership,

Prosecutors,

vs.

20 THE UNEMPLOYMENT COMPENSATION
COMMISSION OF NEW JERSEY,

Defendant.

On Certiorari.
Reasons.

30 The prosecutors assign the following reasons why the determination of the Unemployment Compensation Commission of New Jersey, made on May 4, 1944, reaffirming its decision of June 17, 1943, which held that the prosecutors "David Naidech and Henry Finston, trading as Jersey Appliance Company, are subject employers and liable for contributions and reports on all wages payable by them since July 1, 1937", should be set aside and for nothing holden:

40 1. Because the Unemployment Compensation Commission of New Jersey erred in holding that the Jersey Appliance Company, a partnership, is owned and controlled by the same persons as is the prosecutor, New Jersey Coal & Supply Com-

Reasons.

pany, under R. S. 43:21-19 (h) (1) and R. S. 43:21-19 (h) (2) and R. S. 43:21-19 (h) (4).

2. Because the Unemployment Compensation Commission of New Jersey erred in failing to hold that Augusta Naidech, David Naidech and Henry Finston, trading as New Jersey Coal & Supply Company and David Naidech and Henry Finston, trading as Jersey Appliance Company, were two separate and distinct units, neither of which was owned or controlled directly or indirectly by each other or by the same interest, under R. S. 43:21-19 (h) (1) and R. S. 43:21-19 (h) (4) of New Jersey Statutes Annotated. 10

3. Because the Unemployment Compensation Commission of New Jersey erred in holding that because several of the partners of the prosecutor, New Jersey Coal & Supply Company, were also partners of Jersey Appliance Company, that, therefore, the Jersey Appliance Company was owned or controlled by the "same interests" as contemplated by R. S. 43:21-19 (h) (4) of the New Jersey Statutes Annotated. 20

4. Because the Unemployment Compensation Commission erred in holding that because David Naidech and Henry Finston were 20% interest holders as partners of the New Jersey Coal & Supply Company, that, therefore, Augusta Naidech, David Naidech and Henry Finston, trading as New Jersey Coal & Supply Company owned and controlled the Jersey Appliance Company. 30

5. Because David Naidech and Henry Finston, trading as Jersey Appliance Company did not at any time have in their employ eight or more individuals. 40

Reasons.

6. Because the Unemployment Compensation Commission of New Jersey erred in holding that David Naidech and Henry Finston, trading as Jersey Appliance Company attained the status of a subject employer under R. S. 43:21 of the New Jersey Statutes Annotated.
- 10 7. Because the Unemployment Compensation Commission of New Jersey failed to determine that the prosecutors, David Naidech and Henry Finston, trading as Jersey Appliance Company, were exempt from making contributions at any time under R. S. 43:21 and that the prosecutors, Augusta Naidech, David Naidech and Henry Finston were exempt from making contributions for the year 1943 under R. S. 43:21 of the New Jersey
- 20 Statutes Annotated.
8. Because the decision of the Unemployment Compensation Commission of New Jersey creates an unreasonable classification, inconsistent with the intent and literal meaning of the Act when it defines a partnership as a subject partnership where one or more of its member partners are also member partners of another subject partnership, although the other subject partnership
- 30 may be totally or wholly unrelated.
9. Because the decision of the Unemployment Compensation Commission of New Jersey is violative of the Fourteenth Amendment to the Constitution of the United States in that it deprives prosecutors of equal protection of the law.
10. Because the Unemployment Compensation Commission of New Jersey erred in holding that
- 40 where one or several, but not all of the partners of one partnership, are also the partners in an-

Reasons.

other partnership existing in another city and engaged in another type of business and neither was influenced, dominated or owned or controlled either directly or indirectly by the same interest, that, nevertheless, both partnerships are considered employer units and that the individual partners are considered subject employers under the terms and provisions of Section 43:21 of New Jersey Statutes Annotated. 10

11. Because the Unemployment Compensation Commission of New Jersey should have held that the term "same interests" as used in R. S. 43:21-19 (h) (4) as applied to prosecutors, clearly indicated that Augusta Naidech, David Naidech and Henry Finston, trading as New Jersey Coal & Supply Company, were not the "same interests" as David Naidech and Henry Finston, trading as Jersey Appliance Company and that the above named were two separate individual entities, neither of which contained the "same interest" and neither of which owned or controlled the other. 20

11. The determination of the Unemployment Compensation Commission of New Jersey was in other and divers respects contrary to the statutes and laws of the State of New Jersey. 30

WILLIAM HARRIS,
Attorney for and of Counsel with
Prosecutors.

Order.**NEW JERSEY SUPREME COURT.**

IN THE MATTER
of
 10 HENRY FINSTON and DAVID NAID-
 DECH t/a JERSEY APPLIANCE CO.;
 and AUGUSTA NAIDACH, DAVID
 NAIDACH and HENRY FINSTON,
 t/a NEW JERSEY COAL AND SUP-
 PLY Co.,
 Prosecutors,
vs.
 20 THE UNEMPLOYMENT COMPENSA-
 TION COMMISSION OF NEW JER-
 SEY,
 Defendant.

On Certiorari.
 Order.

30 This matter being opened to the Court by Wil-
 liam Harris, attorney for prosecutors herein,
 upon an application to delete certain exhibits
 from the record; and it appearing that a Writ of
 Certiorari was allowed to prosecutors to review
 a decision rendered by the defendant the Unem-
 ployment Compensation Commission of New Jer-
 sey on May 4, 1944; and it further appearing that
 certain exhibits, namely Exhibits P-3 and P-4, are
 not necessary for the proper determination of this
 issue by the Supreme Court; and it further ap-
 pearing that the printing of the said exhibits
 would unduly encumber the record; and it further
 appearing that consent to the making of this

Order.

Order has been given by Charles A. Malloy, attorney for New Jersey Unemployment Compensation Commission;

It is, on this 28th day of August, 1944, ORDERED that Exhibits P-3 and P-4 shall and the same are hereby deleted from the record and shall not be included in the state of case on this appeal, but that the facts set forth in said Exhibits P-3 and P-4 be included in the form of testimony in the record.

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FREDERIC R. COLIE,
Justice.

We hereby consent to the making of this Order.

CHARLES A. MALLOY,
Attorney of Defendant.

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By HERMAN RINGLE,
Of Counsel.

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Opinion of Supreme Court.

(Filed November 8, 1944.)

NEW JERSEY SUPREME COURT.

No. 222. OCTOBER TERM, 1944.

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IN THE MATTER
of
HENRY FINSTON and DAVID NAI-
DECH, &c., *et als.*,
Prosecutors,
vs.

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THE UNEMPLOYMENT COMPENSA-
TION COMMISSION OF NEW JER-
SEY,
Respondent.

On Writ of
Certiorari.
Before Justices
Case, Bodine
and Porter.

Submitted October Term 1944. Decided

For prosecutors, JOSEPH H. LERNER; WIL-
LIAM HARRIS.

For respondent, HERMAN D. RINGLE; CHARLES
A. MALLOY.

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The opinion of the court was delivered by
CASE, J.

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The Unemployment Compensation Commission
found that "David Naidech and Henry Finston,
trading as Jersey Appliance Company, are sub-
ject employers and liable for contributions and
reports on all wages payable by them since July 1,
1937". That finding is challenged under a writ
of certiorari.

Opinion of Supreme Court.

On June 26, 1937, a partnership was formed consisting of Augusta Naidech, David Naidech (a son of Augusta Naidech) and Henry Finston under the trade name of New Jersey Coal and Supply Company. The business had been long established. It had been started by Hyman Naidech, husband of Augusta Naidech. On Hyman Naidech's death in 1929 Mrs. Naidech, individually, continued the business for a time. Then she incorporated it, holding sixteen of the twenty outstanding shares of stock. As of July 1, 1937, she dissolved the corporation and formed the partnership. That partnership is engaged in the retail sale of coal and mill supplies at Nutley, New Jersey. It was, and for the purposes of this determination will be regarded as still being, a subject employer under the provisions of the New Jersey Unemployment Compensation Act; that is to say, that it has eight employees and is within the application of the statute. Augusta Naidech has an eighty per cent interest (a continuance of her proportion of ownership of the corporate stock) in that partnership. The remaining twenty per cent interest is divided between David Naidech and Henry Finston. 10 20

At about the same time, July 1, 1937, or shortly thereafter, David Naidech and Henry Finston formed the partnership which trades under the name of Jersey Appliance Company. That partnership was and is engaged in the business of buying, selling and repairing refrigerators, washing machines, electric irons and other electrical appliances at Belleville, New Jersey. There is no connection between the New Jersey Coal and Supply Company and the Jersey Appliance Company other than that David Naidech and Henry Finston, sole partners in the Appliance Company, 30 40

Opinion of Supreme Court.

hold a minority interest in and participate to an extent in the management of the Coal and Supply Company. Mrs. Naidech has no interest in and no control over the employees or the affairs of the Appliance Company and does not participate directly or indirectly in its management. The

10 Jersey Appliance Company does not have, and at no time during its existence has it had, eight employees. Neither of the named partnerships is a subsidiary or an affiliate of the other. There is neither proof nor suggestion of fraud upon, or purposeful evasion of, the statute.

It is first argued on behalf of the respondent that a partnership is not a legal entity and that, therefore, the employees of a partnership are the employees of the individuals constituting the partnership. We shall not attempt the difficult task of defining a partnership. Its aspects differ with the changing angle of viewpoint. Sometimes it is referred to as a contract, *In re Gibbs' Estate* (Pa.), 27 Atl. 383; again, as a relation or status, the result of a contract, somewhat as marriage is a relation or status, *Haggett vs. Hurley*, 91 Me. 542, 40 Atl. 561; again, as an association, e. g. our Uniform Partnership Law, R. S. 42:1-6, "A partnership is an association of two or more persons * * *"; and our Workmen's Compensation Act, R. S. 34:15-36, provides that "'Employer' * * * includes natural persons, partnerships and corporations * * *". In *Curtis ads. Hollingshead*, 14 N. J. L. 402, Chief Justice Hornblower, speaking for the Supreme Court on an issue in attachment, said (page 410): "* * * The partnership, the ideal person, formed by the union of interest, is the legal debtor. A partnership is considered in law as an artificial person or being distinct

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40 from the individuals composing it. It is treated

Opinion of Supreme Court.

as such in law and in equity''. Under our Uniform Partnership Law any estate in real property may be acquired in the partnership name and when so acquired may be conveyed only in that name (R. S. 42:1-8 (3)). But whatever the sense in which the word is used, partnership is clearly something more than just one individual added to other individuals; and the fact that the aspects of it vary with varying circumstances makes it necessary, in each instance, to study the context and the function of the word. So, too, "entity" is a word with elastic application. It is defined as something which has reality and distinctness of being; but that reality and distinctness may be either in fact or in thought (Webster's New International Dictionary). Enough has been said to show that while a partnership does not have a separate existence for all purposes and is by no means of such detached individualism as is a corporation (although even a corporate structure may disintegrate into elements of flesh and blood when subjected to certain equitable incidents, *Telis vs. Telis*, 132 N. J. Eq. 25), nevertheless in divers respects a partnership may, in this jurisdiction, come within the legal conception of a distinctive being, viz., an entity. Our present problem is to discover the significance of the word "partnership", not generally, or as a phase of partnership law, but in the particular statute with which we are now concerned; and if a partnership is there conceived of as a reality with distinctness of being, then, so far as this case goes, partnership is an entity.

Employment compensation is a statutory innovation. It confers new rights and new obligations without common law equivalents. The legislature, in creating it, made various arbitrary pro-

Opinion of Supreme Court.

visions, one of which is, in effect, that neither the burdens nor the benefits may be visited upon employees or employer where those actually in employment shall be less than eight, a provision that is not to be altered by judicial construction. *Miller Auto Gear and Parts Co., Inc. vs. Unemployment Compensation Commission*, 132 N. J. L. 34. In the instant case the immediate employer has less than eight employees, but the Unemployment Compensation Commission held that under the statute it was subject to the obligations of the act because its partners were also partners in another partnership, (sic) namely, the New Jersey Coal and Supply Company, that was so subject. An employer, within the meaning of the statute, R. S. 43:21-19 (h) (4), is any "employing unit" which, together with one or more other "employing units", is owned or controlled by the same interests, or which owns or controls one or more other employing units" and which, if treated as a "single unit" with such other "unit or interests", employ eight or more individuals. The phrase "employing unit" is thus defined in R. S. 43:21-19(g) (*italics inserted*):

"Any individual or *type of organization, including any partnership*, association, trust, estate, joint stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January first, One Thousand Nine Hundred and thirty-six, had in its employ one or more individuals performing services for it within this State."

Opinion of Supreme Court.

Taking the pertinent words of the statute, we have it that “‘employing unit’ means * * * any partnership * * * which has * * * in its employ * * *”, etc. Clearly, the statute recognized the partnership as an “organization” that has the right to, and does, employ. The inclusion of partnerships with individuals, companies, corporations and other employing units is persuasive that the legislature conceived of a partnership as an entity, for the purpose of *employing*, within the purview of the statute. Consequently, the argument that the employees of a partnership must be the employees of an individual constituting the partnership for the reason that the partnership is not a legal entity and cannot function as an employer is not, we think, well put. It is true that in construing the partnership relation and contracts growing out of the same courts have held that employees of the partnership are, on certain issues, employees of the individual partners, but we do not regard such holdings as guiding precedents for the determination of the present case. Let us assume that A, B and C are partners and that the partnership thus existing hires less than eight employees and is, therefore, as such, not subject to the statute; and further that B and C form another and entirely disconnected partnership which has eight employees and, therefore, subject to the statute. Under respondent’s argument that A, B and C partnership would be brought within the sphere of the statute and be subject to contributions and reports, and A, who does not have, and is not part of any organization that has, the requisite number of employees is ultimately liable to make such payments, and to carry such other burdens, as the statute places upon a subject employer. Such a development does not,

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Opinion of Supreme Court.

in our opinion, comport with either the theory of partnership or the letter and spirit of the immediate statute.

10 Pursuing the theme of its first point respondent submits the further contention that the term "employing unit" as defined by the act does not constitute a partnership a legal entity. We have already indicated our view to the contrary.

20 Finally, it is said by the respondent that both partnerships are controlled by the same interests, and that, therefore, the Jersey Appliance Company is a subject employer under section 43:21-19 (h) (4) of the Unemployment Compensation Act. The statutory reference has already been sufficiently stated. The argument is based upon the supposition that David Naidech and Henry Finston, who control the Appliance Company, also own or control the Coal and Supply Company which is conceded to be an employing unit and a subject employer; but that supposition runs *contra* the proofs. The testimony being that the partners in the Coal and Supply Company are Augusta Naidech, David Naidech and Henry Finston, these questions were asked of Henry Finston and thus answered:

30 "Q. Are both (sic.) partners, with the exception of David Naidech, who you say is in the Army, active in the management of this partnership? A. Yes.

Q. Do they control the employees and the finances of this partnership? * * * A. Yes."

We find from this testimony that the expression "both partners" relates to Augusta Naidech and David Finston, and that the New Jersey Coal and Supply Company is presently controlled by those

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Opinion of Supreme Court.

partners. It is manifest that on this factual finding Henry Finston and David Naidech, who own and control the Jersey Appliance Company, do not own and do not control the New Jersey Coal and Supply Company.

Moreover, if David Naidech were present and participating and the control of the Coal and Supply Company was, as assumed by respondent, by the partners on a numerical basis, that would not place either the ownership or the control of that company in him and Finston. The word "owns" must be understood to refer to full ownership, and the word "controls" to full control. When ownership or control is incomplete that limitation is usually expressed, as "half ownership", "partial control", or the like. We do not say that a man owns a property when he owns only an interest therein; or with respect to a partnership consisting of A, B and C that A and B are in control simply because if they choose to combine on a given question they may control as to the decision of that question—perchance on another question the combination may be of A and C, or of B and C.

The finding of the Unemployment Compensation Commission will be reversed.

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Order Reversing Determination of Unemployment Compensation Commission.

(Filed November 13, 1944.)

NEW JERSEY SUPREME COURT.

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HENRY FINSTON and DAVID NAID-
DECH, T/A Jersey Appliance
Co.; and AUGUSTA NAID-
DECH and HENRY FIN-
STON, T/A New Jersey Coal
and Supply Co.,

Prosecutors,

vs.

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THE UNEMPLOYMENT COMPENSA-
TION COMMISSION OF NEW JER-
SEY,

Defendant.

On Certiorari.

Order
Reversing
Determination
of
Unemployment
Compensation
Commission.

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This matter coming on to be heard before Part 2 of the Supreme Court at the October Term, 1944, and the Court having inspected the record and being of the opinion that the determination of the Unemployment Compensation Commission should be reversed

It is on this 13th day of November, 1944, ORDERED that the judgment and determination of the Unemployment Compensation Commission be reversed with costs.

Entered this 13th day of November,
1944 on motion of

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WILLIAM HARRIS,
Attorney for Prosecutor.

Notice and Grounds of Appeal.

(Filed October 4, 1945.)

NEW JERSEY SUPREME COURT.

AUGUSTA NAIDECH, DAVID NAIDECH & HENRY FINSTON, t/a NEW JERSEY COAL & SUPPLY Co., a partnership, and HENRY FINSTON & DAVID NAIDECH, t/a JERSEY APPLIANCE Co., a partnership,
Prosecutors-Respondents,

vs.

THE UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Defendant-Appellant.

10

On Certiorari.
Notice and
Grounds of
Appeal.

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To William Harris, attorney of prosecutors-respondents.

Sir:

Please take notice that the defendant in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause because the Supreme Court erred in giving judgment for the prosecutors instead of the defendant, whereas the Supreme Court should have affirmed the determination of

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Notice and Grounds of Appeal.

the Unemployment Compensation Commission of
New Jersey rendered on the 4th day of May, 1944.

CHARLES A. MALLOY,
Attorney for Defendant-Appellant.

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By HERMAN D. RINGLE,
Of Counsel.

Service of a copy of the within Notice and
Grounds of Appeal is hereby acknowledged on
this 3rd day of October, 1945.

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WILLIAM HARRIS,
Attorney for Prosecutors-Respondents.

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New Jersey Court of Errors and Appeals

AUGUSTA NAIDECH, DAVID NAIDECH,
& HENRY FINSTON, t/a NEW JER-
SEY COAL & SUPPLY Co., a part-
nership, and HENRY FINSTON &
DAVID NAIDECH, t/a JERSEY AP-
PLIANCE Co., a partnership,
Prosecutors-Respondents,

vs.

THE UNEMPLOYMENT COMPENSA-
TION COMMISSION OF NEW JERSEY,
Defendant-Appellant.

On Appeal
from
New Jersey
Supreme Court.

Sat Below:
Case, Bodine
and Porter, JJ.

BRIEF ON BEHALF OF APPELLANT.

Statement of the Case.

(The Appellant will be referred to as
the Commission.)

The facts in this case are not disputed.

This Honorable Court is called upon to determine whether each partner is an employer under the aggregate theory of the partnership relation in the application of the Unemployment Compensation Law of New Jersey or whether a partnership is a legal entity in the application of the statute.

The Commission had determined on June 25, 1943, that the aggregate theory of the partnership relation obtained in the application of the statute (S. C., pp. 62-63). The Honorable Court below, in certiorari proceedings, reversed the finding of the Commission and held that a partnership is a legal

entity in the application of the statute (S. C., pp. 72-79; 132 N. J. L. 276). This appeal was instituted to review the judgment entered on the decision.

Statement of Facts.

On June 26, 1937, a partnership was formed consisting of Augusta Naidech, David Naidech and Henry Finston, under the trade name of New Jersey Coal & Supply Co. Augusta Naidech held an 80% interest in the partnership (S. C., p. 7, ll. 11-16; p. 29, ll. 12-13). The partnership acquired the assets and business of the New Jersey Coal & Supply Co., Inc., a corporation, which was an employer subject to the provisions of the Unemployment Compensation Law of New Jersey. The corporation was dissolved as of July 1, 1937. The partnership, as a successor to the business of an employer subject to the statute, also became an employer subject to the statute under the provisions of R. S. 43:21-19(h)(2) and thereafter filed reports with the Commission and paid the required contributions (taxes) (S. C., p. 41, ll. 36-41; p. 42, ll. 4-10; p. 47, ll. 30-34). The partnership business is located in Nutley, New Jersey; and the partnership is engaged in the retail sale of coal and mill supplies (S. C., p. 9, ll. 33-34).

At about the same time, July 1, 1937, David Naidech and Henry Finston, two of the partners of the New Jersey Coal & Supply Co., formed another partnership under the trade name of Jersey Appliance Co. and engaged in the business of buying, selling and repairing refrigerators, washing machines and other electrical appliances at Belleville, New Jersey (S. C., p. 9, ll. 21-32; p. 49, l. 1). The partnership trading under the name of Jersey Appliance Co. employed fewer than eight individuals during all periods following its formation on July 1, 1937 (S. C., p. 43, ll. 19-40).

The Commission on June 25, 1943, determined that David Naidech and Henry Finston were liable for contributions (taxes) on all wages paid or payable by the partnership known as Jersey Appliance Co. since July 1, 1937, as each partner in the partnership known as the New Jersey Coal & Supply Co. was the employer of the individuals working for that partnership, and any additional workers which each might or did have thereafter in any other enterprise were merely additional employees of an already subject employer (S. C., p. 63, ll. 10-31).

Statutory Provision Involved.

The pertinent provision of the Unemployment Compensation Law of New Jersey which is directly involved is:

R. S. 43:21-19(g).

“ ‘Employing unit’ means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January first, one thousand nine hundred and thirty-six, had in its employ one or more individuals performing services for it within this State. * * * ”

Question of Law Involved.

Was David Naidech and Henry Finston, each, an employer under the aggregate theory of the partnership relation?

ARGUMENT.

POINT I.

The employees of a partnership are the employees of the individuals constituting the partnership.

A. A partnership is not a legal entity.

The above conclusion is based on the well established legal principle, derived from common law, that a partnership is not a legal entity separate and distinct from its individual partners. As was stated in the case of *Angell v. White Eagle Oil & Refining Co.*, 169 Minn. 183, 210 N. W. 1004, 1005.

“A partnership is not a legal entity. In law, it has no existence distinct from the persons who compose it.”

The Supreme Court of New Jersey in the case of *Weir v. New Amsterdam Casualty Co.*, 128 N. J. L. 214, 218, recognized the well settled principle that a partnership has no existence distinct from the persons who compose it. In this case a workman's compensation policy was issued to Harry Pilchman operating a business as an individual. Subsequently, Pilchman took in one, Lipschultz, as a partner, but did not communicate the fact of the partnership either to his insurer or to any employee. One, Weir, an employee of the partnership, suffered an injury and recovered an award against the partnership. The question presented was whether the insurance policy issued to Pilchman as an individual covered the employee of the partnership.

Mr. Justice Case speaking for the Court said:

“We are of the opinion, however, that the policy did cover the award. Assuming the fact

to be that at the time of the employment of Weir, as well as at the time of the accident, the employer was a partnership, *it remains that the insured was, as a member of that partnership an employer of Weir* and that a judgment or award obtained by Weir against the partnership was collectible." (Italics ours.)

It is well to observe, at this time, that the definition of an "employer" in the Workmen's Compensation Act is similar to the definition of an "employing unit" in the Unemployment Compensation Law of New Jersey; the Workmen's Compensation Act (R. S. 34:15-36) provides as follows:

" 'Employer' is declared to be synonymous with master, and includes natural persons, *partnerships*, and corporations; * * *". (Italics ours.)

In the case of *State v. Yegen*, 74 Mont. 126, 238, Pac. 603, 607, the Court said:

"Although cases to the contrary may be found, the overwhelming weight of authority and the better reasoning sustain the rule that a partnership is not a legal entity and that it does not exist independently of the partners."

Similarly:

Loomis v. Wallblom, 94 Minn. 392, 102 N. W. 1114, 69 L. R. A. 771;
Abbott v. Anderson, 265 Ill. 285, 106 N. E. 782, L. R. A. 1915F, 668;
Hughes v. Gross, 166 Mass. 61, 43 N. E. 1031, 32 L. R. A. 620;
Francis v. McNeal, 228 U. S. 695, 33 S. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706;
Adams v. Church, 42 Ore. 270, 70 P. 1037, 59 L. R. A. 782;

In re *Peck*, 206 N. Y. 55, 99 N. E. 258, 41
L. R. A., N. S. 1223;
47 Corpus Juris 747.

The Court in the case of *in re Peck, supra*, at page 259, stated the principle as follows:

“The acts performed in the name of a partnership cannot ordinarily be considered apart from the persons composing it. A partnership is not like a corporation, which is a legal entity having certain rights and subject to defined liabilities. It has no independent existence. It has a name by which individuals conduct a joint business, and in which their accounts as such are kept, and through which certain established equitable rights in marshalling assets are required.”

Similar words on this aspect of the partnership relation are contained in *Abbott v. Anderson, supra*. The Supreme Court of Illinois at page 784 said:

“The theory that a partnership is a legal entity distinct from and independent of the persons composing it has never been recognized in the law of this State. Even the marshalling of assets so as to apply the assets of the firm to the payment of firm debts and the individual assets to the payment of individual debts of the several partners is not recognized or enforced in a court of law but is a rule of equity founded on the equity of creditors.”

In the case of *Stilgenbaur v. United States*, 115 F. (2d) 283, the Court held that the California Code provisions on partnership embodying the Uniform Partnership Law of the commission on uniform laws, did not create a new juristic entity but retained “the pluralistic notion of the firm” as the chancellors had worked it out from the com-

mon law, recognizing only joint owners and joint obligors.

The Supreme Court of Illinois in the case of *Meadowcroft v. People*, 45 N. E. 303, at the bottom of page 307, stated:

“The fact that they did their banking business under the name of ‘Meadowcroft Bros.’ did not make that mere name a legal entity and endow it with a personal existence distinct from and independent of themselves. In fact, ‘Meadowcroft Bros.’ was simply a firm name or trade name in which Charles J. Meadowcroft and Frank R. Meadowcroft did the banking business of Charles J. Meadowcroft and Frank R. Meadowcroft; and if they were solvent, then Meadowcroft Bros. was solvent, and if they were insolvent, then Meadowcroft Bros. was insolvent for there was no such person, either natural or artificial, in existence as Meadowcroft Bros., distinguishable from Charles J. Meadowcroft and Frank R. Meadowcroft.”

Justice Holmes in the case of *Francis v. McNeal*, 228 U. S. 695, at the bottom of page 699, speaking for the Supreme Court, stated:

“But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshalling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the Bankruptcy Act.”

Again, on page 700, the Justice says:

“No doubt these clauses, taken together, recognized the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets, and

that of individual debts upon the individual estate. Sec. 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts.”

The Uniform Partnership Law was drawn to express in statutory form the aggregate theory of partnership. In an article written by William Draper Lewis, who prepared the original draft of what is today the Uniform Partnership Law, the following is stated:

“At its conclusion (the conference for the enactment of the Uniform Partnership Act) those present unanimously recommended that the commission should draw the Act on the common law or aggregate theory of partnership treating the partners as holding partnership property by a peculiar tenancy to which should be given those legal incidents which now appear in the Uniform Act. * * *.”
(29 Harvard Law Review 172.)

Reference to the provisions of the Uniform Partnership Law furnishes further proof that the partnership is not a legal entity.

R. S. 42:1-9 provides,

“1. Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.”

R. S. 42:1-18 provides:

“e. All partners have equal rights in the management and conduct of the partnership business.”

Consistent with the above statutory provisions, Mr. Justice Depue speaking for the Court in the case of *Wild v. Davenport* (E. & A.), 48 N. J. L. 129, on page 132 said:

“* * * Every partner, indeed, virtually embraces the character both of the principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal, and so far as he acts for his partners he may properly be considered an agent. Story on Partnership, section 1.”

R. S. 42:1-15 provides:

“All partners are liable:

“a. Jointly and severally for everything chargeable to the partnership under sections 42:1-13 and 42:1-14 of this title.

“b. Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.”

Consistent with the above cited statutory provisions, the Court in *Randolph v. Daly*, 16 N. J. Eq. 313, said:

“A joint execution upon a judgment for a partnership debt may be executed, not only against the partnership property but against the separate estate of each partner, for each is answerable for the whole and not merely for his proportionate share.”

In further support of the theory that a partnership is not a legal entity, the law is well settled that:

(1) A partnership cannot sue or be sued in the firm name alone. The name of each member of the firm must be set forth.

Seely v. Schenk, 2 N. J. L. 75;

Autin v. Townsend, 3 N. J. L. 313;

Buch v. Newsome, 129 N. J. L. 586;

See, 40 American Jurisprudence, page 429, section 430.

(2) A partnership cannot be sued at law by any of its partners.

Sieghortner v. Weissenborn, 20 N. J. Eq. 183;

Taylor v. Thompson, 176 N. Y. 168;

Bosenquet v. Wray, 6 Taunt 597.

It is our contention that before and after the passage of the Uniform Partnership Act, the term "partnership" had a definite legal meaning, inconsistent with the entity theory of partnership, and that by entering into a partnership the individual did not lose his identity as an individual employer. We respectfully submit that the identities of the partners, David Naidech and Henry Finston, were not merged into an entity known as New Jersey Coal & Supply Co. so as to make their employees in this partnership business the employees of a legal entity. They became subject employers as partners of New Jersey Coal & Supply Co.; any of their employees in the partnership business conducted under the name of Jersey Appliance Co., were merely additional employees of two subject employers.

POINT II.

The term "employing unit" as defined by the Unemployment Compensation Law does not constitute a partnership a legal entity.

Section 43:21-19(g) defines an "employing unit" as:

" 'Employing unit' means any individual or type of organization, *including any partnership*, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January first, one thousand nine hundred and thirty-six, had in its employ one or more individuals performing services for it within this State. * * * " (Italics ours.)

It is contended by the respondent that by including a "partnership" in this definition, the legislature intended to constitute a partnership a legal entity. It is our contention, as set forth in Point I of this brief, that a partnership under the common law and the Uniform Partnership Act of this State is not a legal entity; and it is also our contention that there is nothing in the Unemployment Compensation Law of New Jersey which expresses the intention of the legislature to treat a partnership as a legal entity.

The Uniform Partnership Act, adopted in the year 1919, defines a "partnership" as follows:

"A partnership is an association of two or more persons to carry on as *co-owners* a business for profit." (Italics ours.) R. S. 42:1-6.

It will be observed that the word "partnership" was similarly used in Section 19(g) of the Unem-

ployment Compensation Law quoted above. We respectfully submit that the Legislature, when adopting the Unemployment Compensation Law of New Jersey in December, 1936, must have intended to use the word "partnership" with the same meaning which it had given to it in the Uniform Partnership Act and which was construed to have the same meaning under the Workmen's Compensation Law. Cf. *Fenwick vs. U. C. C. of N. J.*, 133 N. J. L. 295.

It has been repeatedly held in this State that where a legal term is used in a statute the term must be taken in the sense in which it is usually understood in the law. In *Yoe v. Marcereau*, 18 N. J. L. 386, the Court held: "Words and phrases must be taken in the sense in which they are usually understood in the law when applied to and used in reference to the subject about which and to which the statute relates." In this case, under a statute relating to dower, the question arose as to whether a widow was entitled to and could recover at law her dower in the land held in trust for her husband and his heirs. The Court held that the common law meaning of dower as defined by our Courts previous to the enactment of this statute must be applied in interpreting the statute.

In *Keyport & M. P. Co. v. Farmers' Transportation Co.*, 18 N. J. L. 13, Aff'd 18 N. J. Eq. 511, the Court in construing a statute said: "Circumstances known to all the public such as what the law was at the time or what it was supposed to be are proper to be considered in looking for the intention of the legislature when not clearly expressed." In *Ex parte Cifola*, 101 N. J. Eq. 540, 138 Atl. 369, the Court held: "Statutes must be construed in the light of existing law."

"Legal entity" is a term which was known to the law at the time of the passage of this statute

and the statute does not use the term "legal entity" nor is there any language in the statute clearly expressing the intention of the legislature to convey such a meaning. It appears to be the contention of the respondent that the use of the word "unit" supplies this inference. The term "employing unit" as used in the act is a comprehensive term which embraces well-known legal entities as well as those which are not.

Furthermore, the construction of the statute which conforms to the contention of the respondent will permit one provision to frustrate and destroy another provision in the statute.

If we consider a partnership to be a legal entity when applying another section of the statute, *i. e.*, R. S. 43:21-19(i) (7) (D), it would defeat the intention of the legislature; for example:

Section 43:21-19(i) (7) (D) exempts the following:

"Service performed by an individual in the employ of his son, daughter or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;"

It was the intention of the legislature by the above paragraph of the statute to exempt services rendered by an individual to a son, daughter or spouse. A similar provision is contained in the Federal Social Security Statute. In the case of *Ekus v. Altmeyer, Etc.*, (U. S. D. Ct. E. D. N. Y. 1943) 52 F. Supp. 306, the facts show that a claim for benefits was made under the Federal statute on the contention that a partnership was a legal entity. A partnership composed of two sons employed their father. The father applied for benefits under the statute. He contended that he was not the employee of the sons but of the partner-

ship entity and that the exemption under the act did not apply to him. The Court at page 307 said:

“Evidently the purpose of the Congress in excepting family employment from coverage was to obviate fraud and collusion. * * * * * This exclusion is already contained in the federal unemployment tax provisions of the existing law and is considered advisable because of the possibility offered by such employment for collusion in building up credits in certain cases which offer a high return for a small amount of contributions.’

“A partnership cannot be regarded as a legal entity. See *Helvering v. Smith*, 90 F. (2d) 590. Plaintiff was employed by his sons * * *.”

and at page 308 concludes:

“Plaintiff, having been employed by his sons, is not entitled to the benefits of the Act.”

In the case of *Waters v. Quimby*, 27 N. J. L. 296, the Court said:

“* * * This construction is in accordance with the familiar principle, that statutes are to be so construed that one clause shall not frustrate and destroy another, but that they shall explain and support one another. *Hard*, 344; *Smith on Stat. Con.* 375. Sound exposition requires effect to be given to every significant clause, sentence, or word in a statute. *James v. Dubois*, 1 Harr. 285; *Den v. Schenck*, 3 Halst. 34; *Lott v. Wyckoff*, 1 Barb. Sup. Ct. Rep. 565.

“When the words of a statute are susceptible of two meanings, the one favorable, and the other hostile to its principal design, the former should prevail and control the construction. Where the words are clear, and the difficulty is made by critical exposition, that exposition should not be adopted in clear contravention of the scope and policy of the act. Few statutes would stand if tried by the

strictest standards of logic, grammar, or rhetoric."

Wouldn't the partners, themselves, be employees of the partnership under the entity theory?

The answer to the above question is not academic in this case as the Jersey Appliance Co., as a legal entity, would have become an employer subject to the statute in 1938 as in that year it had an average of six employees exclusive of the two partners (S. C., p. 43, ll. 24-25); and in 1939 it had an average of seven employees exclusive of the two partners (S. C., p. 43, ll. 28-29).

In the case of *Lyle v. H. R. Lyle Cider & Vinegar Co.*, 243 N. Y. 257, the Court had under consideration the construction of a section of the Workmen's Compensation Law of that State. The definition of an employer was similar to the one contained in our statute which defines an "employing unit." In this case one of the partners sought a compensation award for injuries sustained in the partnership business. He contended that the partnership was a legal entity and that he was employed by the partnership entity and not by the partners. The Court said:

"The copartners, of course, are the principals and employers and we do not think that it is within the contemplation of the Workmen's Compensation Act that one of them may become the employee of himself and his associates and thus at the same time occupy the inconsistent attitude of employer and employee."

If the facts in the case of *Ekus v. Altmeyer*, *supra*, had arisen under our statute and the reasoning of the respondent prevailed, the Court would have arrived at a result which would have defeated the provisions of section 43:21-19 (i) (7) (D) quoted above. It becomes necessary, there-

fore that, in construing section 19 (g) of our statute, a decision frustrating another section, (19) (i) (7) (D), of the act should not be rendered.

The case of *Lyle v. H. R. Lyle Cider Vinegar Co.*, *supra*, presents a situation that could arise under our statute, and if the interpretation suggested by the prosecutor was indulged in, a result contrary to that attained in this decision would follow.

We direct attention to the anomalous situations which must obtain in this State, when applying definitions of a "partnership" which are similar in the Workmen's Compensation Act (R. S. 34:15-36) and in the Unemployment Compensation Law of New Jersey, *supra*, under the decisions of the Supreme Court of New Jersey in the case of *Weir v. New Amsterdam Casualty Co.*, *supra*, and the decision in the instant proceedings, as well as under the Uniform Partnership Act (R. S. 42:1-1 *et seq.*).

Let us assume that X is an employee of A and B, partners, and is injured.

1. The injured employee, X, would make a claim, by reason of his injury, against A and B, as individual partners, under the aggregate theory of the partnership relation.

Let us further assume that after several months X has returned to his job and shortly thereafter is laid off by the partners.

2. X would file a claim for benefits, based on the same contract of hire, under the Unemployment Compensation Law of New Jersey, against A and B, partners, as an entity under the entity theory.

If the respondent's contention is to prevail that a partnership is an entity, then a partner under

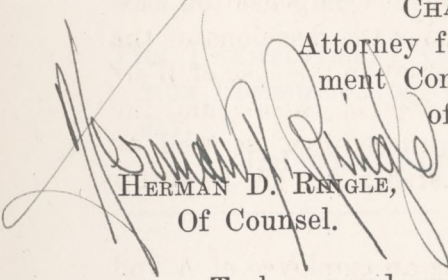
the Unemployment Compensation Law should be entitled to the benefits accruing thereunder, in that he would be considered an employee of the partnership.

Conclusion.

It is respectfully submitted, for the reasons urged, that the judgment of the Honorable Court below should be reversed and the determination of the Commission sustained.

Respectfully submitted,

CHARLES A. MALLOY,
Attorney for Appellant, Unemployment
Compensation Commission
of New Jersey.



HERMAN D. RINGLE,
Of Counsel.

To be argued orally by Mr. RINGLE.

the Employment Commission has should be
entitled to the benefits accruing thereunder, in
that it would be considered an employee of the
partnership.

It is respectfully submitted that the Commission should be considered an employee of the partnership.

Conclusion.

It is respectfully submitted for the reasons
stated that the judgment of the Honorable Court
should be reversed and the determination
of the Commission sustained. It is respectfully
submitted that the Commission should be considered
an employee of the partnership.

Very respectfully,
Attorney for Appellant, Partnership,
Employment Commission,
New Jersey.

To be argued orally by the firm.

New Jersey Court of Errors and Appeals

AUGUSTA NAIDECH, DAVID NAIDECH
& HENRY FINSTON, t/a NEW
JERSEY COAL & SUPPLY Co., a
partnership, and HENRY FIN-
STON & DAVID NAIDECH, t/a JER-
SEY APPLIANCE Co., a partner-
ship,

Prosecutors-Respondent,

vs.

THE UNEMPLOYMENT COMPENSA-
TION COMMISSION OF NEW JER-
SEY,

Defendant-Appellant,

On Appeal from
New Jersey
Supreme Court.

Sat Below:
Case, Bodine
and Porter, *JJ.*

BRIEF ON BEHALF OF RESPONDENTS.

(Italics ours, unless otherwise noted.)

Statement of the Case.

This brief is herewith submitted on behalf of respondents whose position has been supported by the Honorable Court below in determining two principles applicable to "partners" and the "partnership" relation.

The appellant Commission had determined on June 25, 1943, that the aggregate theory of the partnership relation obtained in the application of the Statute (S. C., pp. 62-63). The Honorable Court below, in certiorari proceedings, reversed the findings of the Commission and held as follows:

1. "The inclusion of partnerships within the meaning of the 'employing unit' as defined by the Unemployment Compensation Law is persuasive that that legislature conceived of a partnership as an *entity*, for the purpose of *employing* within the purview of the statute."

2. Two partnerships are not "owned and controlled by the same interests", within the meaning of the Unemployment Compensation Law where the members of one partnership own a minority interest in the other partnership". "The word 'owns', as used in the affiliation provision of the law must be understood to mean 'full ownership', and the word 'controls' to full control" (S. C., pp. 72-79, 132 N. J. 6276).

Statement of Facts.

The facts are not in dispute. On June 26, 1937, a partnership was formed consisting of Augusta Naidech, David Naidech and Henry Finston, trading as the New Jersey Coal and Supply Co. Augusta Naidech held an 80% interest in the said partnership (S. C., p. 7, ll. 11-16; p. 29, ll. 12-13). This business had been long established. It had been started by Hyman Naidech, husband of Augusta Naidech. On Hyman Naidech's death in 1929, Mrs. Naidech, individually, continued the business for a time. Then she incorporated it, holding 16 of the 20 outstanding shares of stock. As of July 1, 1937, she dissolved the corporation and formed the partnership. This partnership is engaged in the retail sale of coal and mill supplies at Nutley, New Jersey. It was, and, for the purposes of the determination of this case, may be regarded as still being a subject employer under the provisions of R. S. 43:21-19 (A) (2); that is to say, that it has (8) eight employees and is

within the application of the statute. The remaining 20% interest in this partnership is divided between David Naidech and Henry Finston.

At about the same time, July 1, 1937, or shortly thereafter, David Naidech and Henry Finston, conceived the idea of organizing another business, and formed the partnership which trades under the name of Jersey Appliance Company. That partnership was and is engaged in the business of buying, selling and repairing refrigerators, washing machines, electric irons and other electrical appliances, and is located at Belleville, New Jersey. This partnership, according to the undisputed testimony, was financed with the personal funds of these two men, and without any financial assistance from the New Jersey Coal and Supply Co. There is no connection between the New Jersey Coal and Supply Co. and the Jersey Appliance Company, other than that David Naidech and Henry Finston, sole partners in the Appliance Company, hold a minority interest in and participate to an extent in the management of the Coal & Supply Co. Mrs. Naidech has no interest in and no control over the employees or the affairs of the Appliance Co., and does not participate either directly or indirectly, in its management. The testimony shows that Jersey Appliance Co. does not have, and at no time during its existence, has it had, eight (8) employees. There is no affiliation in any way, between these two partnerships. There is also, neither proof or suggestion of fraud upon or purposeful evasions of, the state.

Notwithstanding the above facts, the Commission determined on June 25, 1943, that David Naidech and Henry Finston were liable for contributions (taxed on all wages paid or payable by the Jersey Appliance Co. since July 1, 1937,) as

each partner in the partnership known as the New Jersey Coal & Supply Co. was the employer of the individuals working for that partnership, and any additional employees which each had in any other enterprise were merely additional employees of an already subject employer. This ruling was reversed in an opinion written by Justice Heher for the Honorable Court below (S. C. pp. 72-79).

Statutory Provisions Involved.

The following provisions of the Unemployment Compensation Act of New Jersey are directly involved in these proceedings R. S. 43:21-19 (g).

“Employing unit, means any individual or type of organization, *including any partnership*, association, trust, estate, joint stock company, insurance company or corporation, domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1936, had in its employ one or more individuals performing services for it within this State
* * *”

R. S. 43:21-19 (h)

“(4) Any employing unit, which together with one or more other employing units, is owned or controlled (by legally enforceable means or otherwise), directly or indirectly, by the same interest, or which owns or controls one or more other employing units (by legally enforceable means or otherwise), and which, if treated as a single unit with such other employing units or interest, would be an employer under paragraph (1) of this subsection;”

LAW AND ARGUMENT.

POINT 1.

A partnership is a legal *entity*, and therefore, the employees of a partnership are *not* the employees of the individuals constituting the partnership.

I believe that the fundamental fallacy in appellant's position is its failure to read the law as it is presently written without trying to read something into it and in astigmatically interpreting its clear and precise language. As the Honorable Court below pointed out, Employment Compensation is a statutory innovation, conferring new rights, new obligations, without necessarily any common law equivalents. "The legislature, in creating it, made various arbitrary provisions, one of which is, in effect, that neither the burdens nor the benefits may be visited upon employees or employer where those actually in employment shall be less than eight, a provision that is not to be altered by judicial construction. *Miller Auto Gear and Parts Co., Inc. vs. Unemployment Compensation Commission*, 132 N. J. L. 34." And the Court goes on to point out that the words "employing unit" in the statute, indicate a clear-cut intention by the legislature to recognize the partnership as an "organization" that has the right to, and does employ, for it would have been very simple, if in fact the Legislature wanted to adopt the so-called "aggregate" theory, for it to omit any reference to a partnership or to refer solely to the members of a partnership, while it was carefully, and in great detail, enumerating those classes and types of "employing units" which are subject to the provisions of the statute. It follows, that they must

have intended to conceive of a partnership as an *entity* for the purpose of *employing*, within the perview of the statute.

Consequently, courts throughout the country, have unanimously concluded, in interpreting this provision of the statute, that a partnership is a legal entity under the Unemployment Compensation Law. There is not a single decision in the entire country, dealing with the Unemployment Compensation Act, which has held or supported the doctrine of the appellant, and appellant has failed to point out any decision to support its point of view.

It is our contention, that a partnership consisting of A. B. & C. represents a different and unconnected unit from that partnership consisting of A. & B. Let us assume that A. B. & C. are partners in the X partnership, which hires less than eight (8) persons, and is not subject to the partnership; and that A. & B. form the partnership,, wholly unconnected with the first partnership, in a different type of business, which is a subject employer. Under appellant's argument, the X partnership could be made a "subject" employer, and C., who does not have, and is not part of any organization that has, the requisite number of employees is ultimately liable to make such payments, and to carry such other burdens, as the statute places upon a subject employer. Says Justice Heher, speaking for the Court below, "This, in our opinion, does not conform with either the theory of partnership or the letter and spirit of the immediate statute."

That the courts of this State have expressed themselves clearly heretofore on the nature of the partnership entity is seen in an early decision, (*Hollingshead vs. Curtis*, 14 N. J. Law 402, at

page 410) where the Court defined a partnership, as follows:

“A partnership is considered in law as an artificial person, or being, distinct from the persons composing it, and is treated as such in law, and in equity.”

In the case of *In re Bartenshaw*, 157 F. 363, 85 C. C. A. 61, 17 L. R. A. 886, the Court more thoroughly discussed the nature of a partnership. It stated,

“There are two conceptions of a partnership; one springing from the argument on which it is founded, that it is an aggregation of the persons associated together, to share its profits and losses, own its property and liable for its debts. The other, that it is an artificial being, a distinct entity, separate in estate, in rights and in obligation from the partners who compose it. In most of its relations to either persons or things, the latter conception is the more accurate.”

The Supreme Court of Vermont in *Walker v. Weil*, 50 Vermont, 668, held that:

“A partnership is just as distinct and palpable an entity in the eyes of the law, as distinguished from the individuals composing it, as a corporation, and can contract as an individualized and unified party, with an individual person who is a member thereof, as effectively as a corporation can control with one of its stockholders.”

And the Court quotes Justice Brener, in the case of *Lawson v. Dunn*, 66 N. J. E. 90, 57 A. 415, to the effect that,

“Where one joins a partnership as in this case, he makes himself, a part of an entity already existing, which has acquired certain property and business and in acquiring it, has incurred certain indebtedness. The firm owns the property, holds the business, and owes the debts.”

Under the Uniform Partnership Law, any estate in real property may be acquired in the partnership name and when so acquired may be conveyed only in that name (R. S. 42:1-8 (3)).

Further defining the partnership entity, the Honorable Court below stated,

“But whatever the sense in which the word is used, partnership is clearly something more than just one individual added to other individuals; and the fact that the aspects of it vary with varying circumstances, makes it necessary in each instance, to study the context and the function of the word. So, too, ‘entity’ is a word with elastic applications. It is defined as something which has reality, and distinctness of being; but that reality and distinctness may be either in fact or in thought (Webster’s New International Dictionary.) Enough has been said to show that while a partnership does not have a separate existence for all purposes, and is by no means of such detached individualism as is a corporation (although even a corporate structure may disintegrate into elements of flesh and blood when subjected to certain equitable incidents, (*Telis v. Telis*, 132 N. J. Eq. 25), nevertheless, in divers respects a partnership may, in this jurisdiction, come within the legal conception of a distinctive being, viz., an entity.”

And the Court held that it clearly is intended so to be under the provisions of the Unemployment Compensation Law.

We respectfully submit, that the last clause of the extract from the opinion cited hereinabove points out and properly refutes, perhaps the basic blind-spot in appellant’s thinking. He has cited case after case where either a special act applies (example—Federal Bankruptcy Law in the matter of *Francis v. McNeal*, 228 U. S. 695, 33 S. Ct.

701, 57 L. ed. 1029), or where there may exist fraud. We have not contended that courts cannot look behind the partnership structure to uncover fraud or other equitable incidents; quite the contrary. The partnership entity can never be used to hide or shield fraud or deceit. And the legislature or Congress may place specific obligations and responsibilities on the individual partners in cases of insolvency, bankruptcy, or liquidation. But in this case there has never been any suggestion of fraud or wilful evasion of statutory responsibilities.

The case of *Francis v. McNeil*, *supra*, cited by appellant involved Bankruptcy proceedings, and the trustee sought to have an individual partner turn over his own property. Noting that, Justice Holmes restated our concept:

“Since Corey on Accounts was made famous by Lindley on Partnership, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law.”

Justice Holmes, speaking for the United States Supreme Court pointed out that in marshalling of assets in bankruptcy proceedings, an exception is made in the concept. This exception does not prevail in the Unemployment Compensation Law, where a partnership is defined as an entity.

See:

Huitt, Commissioner v. Dayorn, 24 S. E. 2nd 728;

Schwartzman v. Miller, 30 N. Y. Sup. 2nd 882, 262 App. Div. 635;

Karlson v. Murphy, Ill. Sup. Court, C. C. H. No. 8213, Ill.;

Williams v. Ralph R. Miller Shows, 15 So. 249;

Anderson v. Dukes, 143 Pa. 2d 800;

Reasley v. Murphy, 381 Ill. 187;

U. C. C. of North Carolina v. Jefferson Standard Life Insurance Co., 215 N. C. 479;

Godsol v. U. C. C., 302 Mich. 652.

In this connection, the basic rule is generally recognized that a general assembly has the power to broaden or restrict common law concepts. *New York Central Railroad Co. v. White*, 243 U. S. 188.

Therefore, by statutory usage, legislature intent, and unanimous judicial interpretation, the partnership under our Unemployment Compensation Law is an entity, separate and destitute from the partners composing it. This construction was placed not only upon the Unemployment Compensation Law, but also upon the Federal Social Security Act. Mr. Edwin Witte, testifying before the Senate Finance Committee (Chapter 239) at the time that Act was being considered, stated, "The partnership is a separate business unit."

POINT 2.

The term "employing unit" as defined by the Unemployment Compensation Law clearly constitutes a partnership a legal entity.

As we stated in Point 1, the very language of the Unemployment Compensation Law is definitive of the legislature conception of the "employing unit." It states (Section 43:21-19 (g)) that an "employing unit" means any individual or type of organization *including any partnership*

* * * Certainly, the legislature said exactly what it meant. If it did not conceive of the partnership as an employing unit, but rather, as the aggregate of the partners, it would have so stated. The detailed manner in which it defined the types of "employing units" indicates an unmistakable clear intention to include the partnership *entity*, and not the individual partners as the "employing unit."

POINT 3.

Both partnerships are not controlled by the same interest, and that, therefore, the Jersey Appliance Co. is not a subject employer under Section 43:21-19 (h) (4) of the Unemployment Compensation Law.

The testimony is clear that Augusta Naidech, David Naidech and Henry Finston t/a New Jersey Coal and Supply Co., cannot be considered the *same* interests as David Naidech and Henry Finston t/a Jersey Appliance Co. Here it was shown that Augusta Naidech, who had the 80% interest in the partnership known as New Jersey Coal & Supply Co. had no interest in or control over the employees, finances or management of the partnership known as Jersey Appliance Co., nor did she derive any of the benefits therefrom.

The Honorable Court below states succinctly the fundamental and applicable rule, which must be used as the criterion for determining "ownership" and "control":

"The word 'owns' must be understood to refer to *full* ownership, and the word 'controls' to *full* control; when ownership or control is incomplete that limitation is usually expressed, as 'half-ownership,' 'partial con-

trol,' or the like. We do not say that a man owns a property when he owns only an interest therein; or with respect to a partnership consisting of A, B and C that A and B are in control simply because if they choose to combine on a given question they may control as to the decision of that question—perchance on another question the combination may be A and C, or of B and C."

A parallel situation arose in the case of *Pease & Dwyer Co. v. Somers Planting Co.*, 73 So. 673. This case involved a suit on a sale of hay. Two of the partners were common partners of both firms, but one of the firms had a partner who was not a member of the other firm. The Court re-emphasized our position, when it stated:

"It seems useless to cite authorities to show that the liability of two such partnerships is entirely distinct and independent; that neither, as a partnership is liable for the debts of the other; nor can the firm assets of either be subjected primarily to the payment of the obligations of the other."

This has been the universal interpretation placed upon this statute by the Courts throughout the country, in supporting the entity principle as a basis for determination of what is an "employing unit".

The matter of *Huitt, Commissioner et al. v. Dayorn, supra*, involved an application for unemployment compensation, and the question resolved was whether a certain business was an "employer" under the Act. In this case, these were three (3) businesses, which together employed more than eight (8) employees. One of these businesses was operated by one man individually; another was operated by this man and one of his brothers as partners; and the third business was operated

by this man and another as a partnership. The Court held, among other things, that the two partnerships were separate and distinct *entities*, and the mere fact that the persons in those businesses were brothers, and therefore co-operated in their operations, did not render the businesses "owned or controlled by the same interest."

To the same effect, see

Schwartzman v. Miller, 130 N. Y. Sup. 2nd
882, 262 App. Div. 635;
Karlson v. Murphy, Ill. Sup.

In *Karlson v. Murphy*, *supra*, the matter was based on the Unemployment Compensation Law of the State of Illinois, which is almost identical to our Law. In that case, the principal question presented for decision was whether six successive partnerships engaged in the securities business known as Lamson Brothers & Co., were a single employer under the provisions of the Unemployment Insurance Law. It appears that during 1940, that partnership consisted of fourteen (14) members. During the latter part of 1940, one of the partners died, and at a later date, three (3) of the partners withdrew. Thereafter, other members of the partnership died, and some further withdrew, and the Unemployment Compensation Commission took the view that each partnership was a new employing unit. The Court affirms our contention that the definition of "employer" in terms of an "employing unit" manifests the legislative intent that technically legal definitions of the word "employer" are not applicable to cases arising under the Statute. In short, the terms, "employing unit", "employer" and "employee" differ from the common law concepts and the commonly accepted connotations of these

terms, and the legislature has the power to define its own terms. *New York Central Railroad Co. v. White, supra.*

Finally, in a recent case, (Appeals Referee Dir. #A R-61-C. C. H.), a situation was presented where X & T owned 80% of the stock of the B. Corporation. The corporation employed five (5) individuals. X & T each owned a one-fourth interest in a partnership which employed six (6) individuals. The Court held that inasmuch as X & T combined owned only a one-half interest in the latter partnership, they did not "control" it. Therefore, the corporation and the partnership were not "owned" or "controlled" by the "same interests."

In conclusion, we wish to point out that notwithstanding the fact that no case in the entire country has supported appellant's interpretation of the particular provisions of the Unemployment Compensation Law hereinabove referred to, and despite competent rulings by the highest appellate Courts of New York, Illinois and Georgia, on these provisions based on comparable sets of facts and law, that the appellant chose to disregard these interpretations and enforce an interpretation inconsistent with the very language of the Statute itself, the clear legislative construction and intent, previous judicial interpretations. Had appellant applied, the accepted yard-stick, it would have reached the inevitable conclusion that the partnership known as Jersey Appliance Company was a separate and distinct "employing unit," unconnected nor affiliated with the partnership known as New Jersey Coal & Supply Co., and is therefore, under the facts herein presented, not a "subject employer" under the provisions of the Act.

Conclusion.

It is respectfully submitted, for the reasons urged, that the judgment of the Honorable Court below should be affirmed, with costs.

Respectfully submitted,

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To be argued orally by Mr. LERNER.

INDEX.

	page
Notice of Appeal to Supreme Court.....	1
Specification of Determinations.....	2
Summons	3
Writ of Demand	6
Demand for Trial by Jury	18
Notice to Answer Interrogatories.....	19
Demand for Interrogatories	20
Stipulation	22
Deposition of Morris Alper.....	24
Deposition of Harold Alper	26
Judgment Record	31
Order for Rule to Show Cause for New Trial	36
Notice of Hearing on Rule for New Trial	40
Affidavit of Theresa Alper	41
Affidavit of Ethel Steinberg	42
Order Denying New Trial	45
Related State of Case	47
Verdict (Irvington District Court).....	546

