W. Q. T., Inc. *and* General Warehousemen Local 598, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 31-CA-9141

January 26, 1981

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND TRUESDALE

On September 19, 1980, Administrative Law Judge George Christensen issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent also filed a motion requesting the Board to dismiss the General Counsel's exceptions, and the General Counsel filed an opposition to the motion. The Respondent's motion is denied.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge[2] and to adopt his recommended Order.

ORDER

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

[1] Due to error, the Respondent's counsel was not originally served with a copy of the General Counsel's exceptions, although the Respondent as a company was sent a copy by ordinary mail. Upon counsel's inquiry, he was promptly sent a copy of the exceptions and was granted an extension of time to respond. We see no prejudice to the Respondent by reason of the error.

[2] We agree with the Administrative Law Judge's findings that the Respondent was not a successor to Western Quarry Tile, and that the Respondent's own volume of business did not satisfy the Board's standards for asserting jurisdiction. As the complaint will be dismissed for lack of jurisdiction, we find it unnecessary to consider the merits of the 8(a)(3) and (5) allegations of the complaint.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge: On February 21 and 22, 1980, I conducted a hearing in Los Angeles, California, to try issues raised by an amended complaint issued on August 30, 1979,[1] and amended on December 12 and January 14, 1980, based on a charge filed by General Warehousemen Local 598, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,[2] on June 28. The complaint alleged that W. Q. T.,[3] an alleged successor of Western Quarry Tile, Inc.,[4] violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (hereinafter called the Act), by refusing to yield to the Union's demand that it grant seniority for purposes of layoff, recall, vacation, etc., to any of Western prior to going on strike against that employer.

WQT denied it was a successor employer to Western, denied it met the Board's jurisdictional standards for nonretail enterprises, conceded it refused to yield to the union demand stated above, and denied it violated the Act.

The issues are:

1. Whether WQT was a successor to Western within the meaning of the Act.

2. Whether WQT met the Board's jurisdictional standards.

3. Whether WQT violated the Act.

The parties appeared by counsel at the hearing and were afforded full opportunity to adduce evidence, to examine and cross-examine witnesses, and to argue and file briefs. Briefs were filed by the General Counsel and WQT.[5]

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

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer admitted, and I find that at all pertinent times the Union was a labor organization within the meaning of the Act.

The facts concerning the issue of whether the Board has or should exercise jurisdiction over WQT are intertwined with the successorship issue; the jurisdictional issue shall be determined after, and on the basis of, factual findings entered below.

II. THE FACTS

Between 1965 and April 2, 1979, Western operated a plant located at 2428 Dallas Street, Los Angeles, California, which produced glazed and unglazed clay tiles. Marcel Hoessly owned and managed the business. He employed supervisory, sales, production, and maintenance personnel in his operations. The jobs performed by the production and maintenance employees were interchangeable; they did not have specific job titles nor regular, assigned duties; no seniority system was followed or employed; and the employees in question mixed batches

[1] Read 1979 after all further date references omitting the year.

[2] Hereinafter called the Union.

[3] Hereinafter called WQT.

[4] Hereinafter called Western.

[5] WQT moved for permission to file a reply brief to cite a pertinent case decision which issued after cross-briefs were filed and to correct alleged misstatements and errors in the General Counsel's brief. The motion is granted.

of clay, filled molds, sprayed tiles, loaded and unloaded kilns, packed tiles for shipment, etc.

On May 15, 1978, the Board issued a certification finding that a majority of Western's production and maintenance employees cast votes, in a secret- ballot election previously conducted by the Board, for representation by the Union for the purpose of bargaining collectively with Western concerning their rates of pay, wages, hours and working conditions.[6]

Between July and October 24, 1978, representatives of Western and the Union met a number of times to negotiate an agreement. Western was represented in the negotiations by Hoessly and District Manager of the California Association of Employers James Richardson,[7] of which Western was a member. The Union was represented by Maurice Feldman, organizer.[8] On the latter date, Western had 13 production and maintenance employees in its work force.

On October 25 the Union called and the 13 production and maintenance employees participated in a strike against Western in support of the Union's contract demands. The strike (and picketing of Western's premises) continued through April 2.

In the year preceding October 25, 1978, Western sold tiles valued at $416,539; $107,536 of those sales were made to customers located outside of the State of California. Western attempted to continue its operations between October 25, 1978, and April 2 with a reduced work force; during the period in question, its gross sales were $158,796, of which $6,034 were made to customers located outside of California.

At the end of the year, Hoessly decided to sell the business and negotiated its sale to Walter Oleson. Hoessly and Oleson agreed to close the sale on April 2. Prior to consummation of the sale, Oleson visited the plant frequently, observed the production process, acquainted himself with the market Western served, and was fully advised concerning the Union's certification, Western's negotiations with the Union concerning contract terms, the strike, and the picketing (Oleson also observed the union pickets on his various visits to the plant).

Oleson purchased the business with the intention of installing a number of laborsaving machines and producing more standard, uniform tiles than the tiles Hoessly produced. He believed that by automating the tilemaking process he could meet or exceed Hoessly's production with about half the production and maintenance force Hoessly employed. With this in mind, he purchased and, with Hoessly's consent, stored a ram press machine at the plant in January. He subsequently purchased an extruder, a clay mixer, and electrical components needed for the operation of the machines. Prior to consummating the purchase, Oleson formulated plans for the number of production and maintenance employees he would hire and the rates of pay, wages, hours, and working conditions he would offer them; he planned to hire seven production and maintenance employees (one leadman over the casting and glazing crews, one caster and one caster helper, one glazer and one glazer helper, and one batcher and one ram press operator); to pay the glazer, caster, and press operator between $4.75 and $6 per hour, to pay the batcher between $4.25–$4.85 per hour; to pay the helpers between $3–$3.40 per hour; and to pay the leadman 25 cents more per hour than the top-rated caster or glazer. He also planned to offer 1 week of vacation after 1 year of service and 2 weeks after 2 years; seven paid holidays a year; 5 days of sick leave after 1 year of service; hospital and surgical insurance coverage after 60 or 90 days of employment (he was undecided which waiting period to set until he checked out some plans); and credits toward vacation, etc., dating from each employee's hiring date. He also decided to hire individuals as and when they applied, to require each applicant to submit a job application, and to offer each applicant who he was satisfied could meet his job needs of employment at the rates of pay, etc., he had formulated. Oleson neither sought nor secured any information from Hoessly concerning the rates of pay, hours, and working conditions of Western's production and maintenance employees and independently determined the rates of pay, hours, and working conditions he intended to offer.

In March Oleson caused WQT to be formed. On April 2 Oleson signed a sales contract with Hoessly wherein Oleson as an individual purchased Western's goodwill, inventory, assets (including Western's office and shop equipment, tools, machinery, leasehold improvements, etc.), and the right to do business under Western's name; Oleson expressly negated the assumption of any of Western's liabilities or obligations; and Hoessly agreed not to compete with Oleson within southern California for a 3-year period. Oleson at the same time negotiated and executed a 5-year lease on the premises housing Western's business. Following execution of the sales and lease contracts, Oleson conveyed his interests therein to WQT.

The same day (April 2) Oleson posted a notice outside the plant advertising: (1) A new owner, WQT, was commencing business as a tile manufacturer at the premises; (2) the new owner was hiring and invited anyone interested in a job to file an employment application; and (3) the new owner was interested in hiring employees with prior experience in the business. The notice was written in English. The next day Oleson posted a second sign containing the same information written in Spanish. There were pickets present on both days (and on each day subsequent through January 1980) and they inspected the signs. On the latter date Richardson also sent a letter to the Union notifying the Union that Hoessly sold his business on April 2.[9]

Prior to commencing operation of the business, Oleson offered Malcolm Saucier, who had previously been employed by Western as a supervisor, employment by WQT as a supervisor at the same wages he received from Western and the fringe benefits recited hereto-

[6] Case 31-RC-4095.

[7] Richardson acted as Western's spokesman.

[8] I find at all pertinent times Hoessly and Richardson were agents of Western and Feldman was an agent of the Union within the meaning of Sec. 2 of the Act.

[9] Hoessly informed Richardson prior to April 2 he was selling the business to Oleson; Richardson promptly contacted Oleson and persuaded him to join and authorize the California Association of Employers to represent WQT from and after April 2.

fore.[10] Saucier accepted and began work on April 2. On the same date, Oleson offered his brother, David Oleson, employment as a glazer, at the glazer rate of pay and the aforementioned fringe benefit levels. David (hereinafter called D. Oleson) accepted and also began work on April 2.

While the Union continued to picket the premises after WQT commenced its operations on April 2, none of Western's employees applied to WQT for employment between April 2 and 16. On the latter date, WQT began to run a help-wanted ad in a local newspaper.

On April 17, John Herrmann was hired as a caster at the caster rate of pay and fringe benefit schedules described above, after filling out a job application and scrutiny of his references and employment history.

On April 23 Kil Song Chin was hired at a $6 per hour rate of pay (the record does not show what job classification he was assigned) and the fringe benefit schedules previously described, after filling out a job application and scrutiny of his references and employment history.[11]

On either April 23 or 24,[12] Gilberto Chavez was hired as a helper after filing a job application and accepting an offer of the helper wage rate and other benefit schedules set out above.

On the former date (April 23) Oleson received his first contact from the Union.[13] Feldman identified himself and asked Oleson if he were willing to meet and negotiate with the Union. Oleson stated he was prepared to do so,[14] and the two agreed to meet on May 3.

On the following day, April 24, one of Western's former employees who had been picketing the plant since WQT began its operations, Ernesto Arosegoi, appeared and asked for a job. When Oleson asked him to fill out a job application, however,[15] Arostegoi refused to fill out the application, stated the Union instructed him not to sign anything, and said he would come back later. He never returned. No other former Western employee ever appeared and applied for work.

On April 25 Marvin Adams was hired as a caster, after filing a job application and accepting an offer of the caster wage rate and other benefit schedules set out heretofore.

On June 9 another brother of Oleson's, Gregory Oleson (hereafter called G. Oleson), was hired as a batcher, after filing a job application and accepting an offer of the batcher wage rate and other benefit schedules set out above.

On June 24 Diego Chiriboga was hired as a helper, after filling out a job application and accepting an offer of the helper wage rate and other benefit schedules set out above.

With the hire of Chiriboga, the work force, contemplated by Oleson prior to WQT's commencement of operations, was practically complete (except for a ram press operator, which position was not filled because the press was not yet operable, and a leadman).

In early July, due to financial problems, WQT shut down its operations and laid off all its production employees (Adams, Chavez, Chiriboga, Herrmann, D. Oleson, and G. Oleson) as well as its supervisor (Saucier). When it resumed reduced operations in late July, only D. Oleson, G. Oleson, and Saucier were recalled. Between late July and February 22, 1980 (the date the hearing closed), these three constituted WQT's entire work force.

During its operations between April 2 and the date of the hearing (February 21, 1980), WQT utilized the same office and shop facilities Western employed in operating its business; used the same tools, equipment, machinery (with some added new machinery), and materials (exhausting Western's materials inventory and replenishing those materials by purchase from the same suppliers Western bought from); produced the same product (glazed and unglazed clay tiles); sold a substantial amount of the tiles it produced to the same customers Western had; and billed its customers on invoices containing either the heading "Western Quarry Tile" or the heading "Western Quarry Tile—by WQT, Inc." With one exception,[16] none of Western's production and maintenance employees made any effort to secure employment with WQT. WQT neither knowingly offered[17] nor placed into effect any of the wages, hours, or working conditions Western's employees received prior to going on strike, and WQT's work force never included any of Western's production and maintenance employees.

While WQT, in response to the General Counsel's subpena, produced at the hearing its sales records for the period April 2, 1979—January 31, 1980, the General Counsel introduced into evidence only those invoices showing WQT's sales between April 2 and September 30, a 6-month period. The introduced records show that during that 6-month period, WQT's gross sales were $96,722, of which $1,110 were sales directly to customers located outside the State of California. The records do not show what proportion of those sales were made to customers who in turn did business with customers outside the State of California (nor, as to any such customers, the value of the business they transacted with their customers located outside the State of California). The records introduced into evidence establish, during the

[10] Oleson needed an experienced supervisor to direct the casting and glazing operations and to operate the kilns.

[11] Chin worked 1 day (April 24); he failed to report for work thereafter.

[12] Oleson testified he interviewed and hired Chavez on April 23, while his job application is dated April 24.

[13] Oleson testified Feldman contacted him by telephone that date; Feldman testified he visited the plant and made personal contact with Oleson. I find it unnecessary to resolve the conflict, since both agree the contact occurred on April 23 and both agreed on the substance of their conversation.

[14] Oleson explained that, while he was aware none of WQT's employees formerly were employed by Western and he had no indication any of WQT's employees designated the Union as their representative for collective-bargaining purposes, he agreed to meet and negotiate with the Union in the hope he could bring the picketing to an end.

[15] The only information Hoessly left Oleson concerning Western's employees was a list of their names and social security numbers; Oleson had no knowledge of which jobs they performed, the skills they possessed, or their wage rates, etc.

[16] Arostegoi.

[17] As noted above, Oleson was not acquainted with the wages, rates of pay, hours, and working conditions of Western's production and maintenance employees and, therefore, any similarity between the wage rates, etc., he instituted for WQT's employees and those of Western's employees would be accidental. Western's rates of pay, etc., were not introduced for comparison purposes.

same period, WQT purchased materials valued at $11,242. Oleson testified those materials were purchased from suppliers located inside the State of California. The record does not reflect whether those suppliers made purchases from suppliers outside the State of California, nor, if so, in what amount.

Pursuant to Feldman's request, WQT and the Union met on May 3, 10, 15, 21, 23, and 30 and on June 5, 11, 12, 18, 21, and 28. WQT was represented by Oleson and Richardson. Richardson acted as WQT's spokesman. Jules Sanford, a friend of Oleson's, attended the first two meetings, but none thereafter. The Union was represented throughout by Feldman, who acted as its spokesman. Feldman was accompanied at several meetings by union representatives John Gilligan and Louie Andretti.[18]

At the commencement of negotiations, Feldman requested the parties resume negotiations at the point Western and the Union were immediately prior to the strike. Richardson declined, stating WQT was not Western's successor, it was a smaller and different operation, and it did not consider itself bound by any agreements made by Western. Richardson suggested Feldman furnish WQT with any proposals the Union wanted WQT to consider. Feldman declined to do so. The parties eventually agreed to utilize language contained in a document labeled, "Proposal-Western Quarry Tile and Teamsters Local 598" and language contained in the Union's current contract with the Los Angeles Warehousemen's Association as a basis for discussion. The parties first discussed noneconomic issues, reaching tentative agreement on a number of provisions, including language contained in the recognition provision of the Union's contract proposal to Western (substituting WQT, of course, for Western, as the Employer party) and a modification of the language of the seniority provision of the Warehousemen's contract reading:

> Seniority rights for employees shall prevail under this Agreement and all agreements supplemental hereto. Seniority means length of continuous service without a break *from the employee's last date of hire*.[19]

For the same reason, Richardson proposed (and Feldman accepted) a WQT proposal that the parties expressly agree, on adoption of the language of article XXXII, section 1, of the Warehousemen's contract,[20] that only the wage scales, benefits and conditions established by WQT from and after April 2 would be preserved in the future.

By the June 12 meeting, the parties had settled on the language of provisions of a prospective contract between them governing noneconomic issues. On that date, Richardson presented WQT's proposals on economic issues (wages, holiday pay, vacation pay, etc.). At some point during the ensuing discussion, a union representative asked how many employees WQT needed and how the prospective contract would affect any of Western's former employees who were hired. In response to the former, Oleson stated WQT needed about one or two more employees (within the production and maintenance categories) and, in response to the latter, Richardson stated, since WQT had no information concerning Western's former employees other than their names and social security numbers, WQT would accept employment applications from any of Western's former employees who desired employment by WQT, would accord such applicants preferential hiring status in jobs their applications indicated they were qualified to perform, and any former Western employee hired would have seniority for all purposes, including vacations, from his date of hire by WQT, in accordance with the language the parties had agreed to for the seniority and maintenance of standard provisions of their tentative agreement. The Union rejected WQT's economic proposals, contended the words "from the employee's last date of hire" agreed upon in the former provision meant the employee's last date of hire by Western, and expressed concern over the effect the agreed-upon language had on the vacation entitlement of any former Western empioyee hired by WQT. Richardson then proposed granting any former Western employee hired by WQT a "service credit," for vacation purposes only, based on his total service with Western, to be added for vacation purposes at the end of 1 year of service with WQT (and in subsequent years). The Union objected (since the employee in question would then lose credit for the period dating from the date of his last day of employment by Western to the date he was employed by WQT), and proposed such an employee receive a prorated vacation on each anniversary date following his date of hire by WQT based upon a service period dating from his last date of hire by Western. Richardson accepted the proposal. At the next to the last meeting (on June 21), the Union announced it was going to file a refusal-to-bargain charge against WQT unless it adopted the Union's interpretation of the seniority provision, granting seniority for all purposes, including layoff and recall, to any former Western employee, from the date he was hired by Western rather than the date he was hired by WQT. Richardson responded WQT was required by law to bargain over the language and interpretation of a seniority provision covering WQT's production and maintenance employees, but it was not required to agree to the Union's proposal with regard to those subjects, and that it had bargained in good faith.

At the final meeting (June 28), the parties agreed they had reached an impasse on the issues of seniority, overtime, and the right of management personnel to perform

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[18] I find on such occasions Gilligan and Andretti were agents acting on behalf of the Union within the meaning of Sec. 2 of the Act.

[19] The italicized language was proposed by Richardson and accepted by Feldman; it was sought by WQT to insure any former Western employees who sought and secured employment with WQT would have seniority rights equal to those formulated by WQT prior to commencing operations and offered and accepted by its current employees.

[20] The section reads as follows:

> Title—Maintenance of Rates of Pay and Monetary Benefits—language—Any employee covered by this Agreement who, prior to the effective date of this Agreement, was receiving a higher rate of pay or a higher differential rate of pay than the rates required by the previous agreement, shall continue to receive such favorable rate or differential rate of pay as long as there is no change in the classification of the work he is performing. This provision shall include but not be limited to wage rates, holiday pay and vacation pay. All other monetary benefits shall be continued.

production and maintenance work. There were no meetings scheduled or held thereafter.

The Union removed its pickets at WQT's premises in January 1980.

III. ANALYSIS AND CONCLUSIONS

A. *The Successorship Issue*

While it is clear from the foregoing WQT produced and sold the same products Western produced and sold, glazed and unglazed clay tiles; used the same premises, tools, and materials and most of the same machinery and equipment Western utilized in manufacturing those products; utilized Western's name and good will in its business operations; and sold its products to a substantial number of Western's customers; it is likewise clear WQT decided, prior to commencing its operations, to formulate its own wage rate and fringe benefit schedules, hourly and other conditions of employment, without knowledge or regard for the wage rates, benefits, hours, and working conditions of Western's employees; and to offer employment to qualified individuals as and when they filed employment applications, met the qualifications desired, and accepted the wage rates, benefit schedules, hours, and other working conditions previously determined, including any individuals formerly employed by Western; and that only one of Western's employees sought employment by WQT and refused to complete an application, so WQT's employee complement did not include any former Western employees.

It is settled law a purchaser company has a right to determine the wage rates, etc., it wishes to offer prospective employees prior to commencing operation of the purchased business[21] and it is equally settled that the purchaser is not obligated to offer employment to the employee complement of the company whose business it has purchased, so long as it did not refuse to hire such company's employees for discriminatory reasons.[22]

The General Counsel contends WQT "hired" the production and maintenance employees[23] who went on strike against Western on October 24, 1978, when Oleson agreed, on April 23, to meet and negotiate with the Union. The General Counsel also relies on the following exchange between the General Counsel and Richardson to establish the employees in question were employees of WQT:

> Q. Now is it your understanding that the strikers were still striking the premises at WQT during the negotiations?
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> A. There were people out there picketing. We did not have any real knowledge as to who all they were. But some we felt were employees. Some we felt, you know, were not employees.

I reject the General Counsel's contention. Findings have been entered that Oleson, prior to commencing operations, anticipated employing a work force not exceeding seven or eight employees, including a leadman and a ram press operator; the ram press still was not operable at the time of the hearing and a leadman never was employed; Oleson followed the policy, from the inception of WQT's operations, of hiring individual applicants as and when they applied for jobs, filled out an employment application, satisfied him they possessed the aptitude, attitude, background, and experience he desired for whatever jobs were vacant, and accepted his offer of the requisite wage rate, benefit schedules, etc., he had formulated prior to commencing business; he agreed to meet and negotiate with the Union in the hope such meeting and negotiations would result in the cessation of the Union's picketing activities; and he informed the Union, in the course of those negotiations, that he only needed one or two more employees to round out his employee complement.

On the basis of the foregoing, I find WQT never contemplated hiring any of Western's production and maintenance employees other than whatever number applied for employment by WQT, filled out employment applications, satisfied Oleson as to their job qualifications, etc., and accepted an offer of the rates of pay, wages, hours, and working conditions Oleson formulated prior to commencing business; and that, since none of Western's employees ever so applied, none of them ever became WQT's employees and never were so considered by WQT.

As to Richardson's remarks, their meaning clearly is not that attributed to them by the General Counsel; all Richardson conveyed was his belief or understanding some of the pickets were formerly employed by Western and some of them were not.

A recent Board decision[24] holds an employer may not be considered a successor employer for purposes of the Act when that employer neither contemplates the hiring nor hires a majority of its predecessor employer's employees within an appropriate unit, on purchasing and assuming operation of the business formerly conducted by such predecessor.

In the *Vantage* case, Exxon operated a number of gas stations on several New York freeways under contracts with the State of New York and the Jones Beach State Parkway Authority expiring December 31, 1977. Prior to the expiration of the contracts, Vantage underbid Exxon on the contracts and was chosen to operate the stations under contracts expiring December 31, 1982. Exxon's employees at the stations in question were covered by a contract with Teamsters Local 808. In preparation for its assumption of Exxon's operations, Vantage formulated wage rate schedules predicated on the Federal minimum wage and schedules covering other benefits, hours, and working conditions, and decided to recruit employees on an individual basis. Its executives posted notices it was seeking employees to man the stations, ran help-wanted ads, and visited the various stations, outlining its pro-

[21] *Spruce Up Corporation*, 209 NLRB 194 (1974).

[22] *N.L.R.B.* v. *The William J. Burns International Detective Agency Inc.*, 406 U.S. 272 (1972); *N.L.R.B.* v. *Foodway of El Paso*, 496 F.2d 117 (4th Cir. 1974).

[23] The General Counsel asserts the unit consisted of 14 employees when the strike commenced; the record, however, shows one employee quit the day before the strike commenced. The record also shows several of the striking employees returned to work for Western prior to 1979 and subsequently quit Western's employ.

[24] *Vantage Petroleum Corp.*, 247 NLRB No. 202 (1980).

posed wage, etc., package. By approximately a week prior to assuming operation of the stations, Vantage had received and processed job applications and hired a full employee complement to man the stations. While Teamsters Local 808 members covered by the Exxon contract visited Vantage's offices and requested employment and Vantage responded to Teamsters Local 808's request to meet with its officials, the members in question rejected the pay scales offered by Vantage (insisting on retention of their Exxon wage scales), stated (through a spokesman) they would not accept employment with Vantage unless Vantage recognized Local 808 as their collective-bargaining representative, and Vantage refused to execute a contract with Local 808 covering its employees at the stations. On these facts, the Board stated:

> [W]e find that Respondent's (Vantage's) actions in regard to the Exxon employees did not violate Section 8(a)(1) and (3) of the Act . . . the facts establish that Respondent had decided, before being approached by Nasti (a Local 808 steward employed by Exxon) and the Union in early December, on the wages and terms and conditions it would offer employees, and that it would not simply hire the complement of Exxon . . . employees then working at the parkway stations, but would hire employees individually as they applied regardless of source. Consequently, Respondent was not a successor employer to . . . Exxon. . . . In these circumstances, Respondent was under no obligation to hire the Exxon . . . employees either individually or as a group . . .[25]

WQT's pattern was similar; WQT formulated its wage and benefit package to offer to prospective employees prior to commencing operations, without regard to the wage and benefit package of its predecessor operator, Western; WQT decided prior to commencing operations to hire employees individually, without regard to source; and not a single Western employee sought and secured WQT employment.

On the basis of the foregoing, I find and conclude WQT was not a successor to Western for purposes of the Act.

B. *The Jurisdictional Issue*

Siemons Mailing Service, 122 NLRB 81 (1958), establishes the standard the Board has applied in deciding whether or not to assert its jurisdiction over nonretail establishments. Under the *Siemons* standard, the Board will not assert its jurisdiction unless such establishment has a combined direct and indirect outflow across state lines valued at $50,000 or a combined direct and indirect inflow across state lines valued at the same amount.

Findings have been entered that in the calendar year preceding the date the Union called and Western's production and maintenance employees went on strike (October 25, 1978), Western sold tiles valued at $107,536 to customers located outside of the State of California. On the basis of that finding, I find and conclude that at times pertinent herein Western was an employer engaged in commerce in a business affecting commerce within the meaning of Section 2 of the Act.

The General Counsel contends WQT, as a successor to Western, should be adjudged an employer engaged in commerce in a business affecting commerce on the basis of the same proof, inasmuch as Western's employees were on strike on and after October 25, 1978, and a fair measure of WQT's business volume, absent the strike and picketing, may be presumed to reach the same volume.

Since I have entered findings WQT was not a successor to Western, I shall evaluate the question of whether WQT meets the Board's standard on the basis of its volume of business, not that of Western.

The General Counsel chose to limit his introduction of evidence concerning WQT's business to a 6-month period extending from April 2 through September 30; projecting the volumes demonstrated over a 12-month period, it appears WQT's gross sales would be $193,444, with direct out-of-state sales valued at $2,220 and its gross purchases would be $80,856 (adding the value of initial inventory of materials to materials purchased during the 6 months, and multiplying by two), all purchased within the State of California.

The above projections fail to satisfy the standard, either on the basis of the projected value of WQT's outflow across state lines or WQT's inflow.

I, therefore, find and conclude the General Counsel failed to establish by valid evidence WQT met the Board's standard for assertion of its jurisdiction over nonretail enterprises and, therefore, the complaint should be dismissed.

C. *The Alleged Violation of the Act*

Inasmuch as I have entered findings WQT was not a successor to Western within the meaning of the Act and the General Counsel failed to prove WQT met the Board's jurisdictional standards, the complaint warrants dismissal on those grounds. However, so the Board may have before it findings on all issues raised in the course of the proceeding, I shall also consider the complaint allegations WQT violated the Act by refusing to yield to union demands WQT afford any Western employee it chose to hire seniority dating from the date he was last hired by Western prior to going on strike against that employer.

I have entered findings Oleson engaged in contract negotiations with the Union and tentatively agreed to language wherein WQT would recognize the Union as the exclusive representative of its production and maintenance employees, despite the absence of any basis for a belief WQT's production and maintenance employees desired representation by the Union, because he wanted to see if he could reach an accommodation with the Union which would cause it to cease picketing WQT's premises. All the time such negotiations were in progress, the Union neither represented any of WQT's production and maintenance employees nor had assurance any of its members or supporters would be hired, other than the few Oleson thought he might need to complete his work force.

[25] 247 NLRB No. 202.

In the absence of evidence the Union represented a majority of WQT's production and maintenance employees at the time the negotiations took place, WQT had no duty or obligation to bargain with the Union; therefore, WQT could not violate the Act by refusing to yield to the Union's demands any union supporters formerly employed by Western it chose to hire should receive credits for seniority purposes exceeding those of WQT's other employees.

Even were this not so, I find WQT's proposal on seniority was not unlawful; the parties settled on seniority language contained in the Union's Warehousemen contract, with the modification seniority would date from the last date of each employee's hire. Since it is clear the contract was between WQT and the Union, Richardson's interpretation thereof, i.e., that they had agreed on seniority dating from the date of each employee's hire by WQT, without regard to who the previous employer of such employee was, was not unreasonable; it was the result of the give and take of normal bargaining. WQT established its wages, etc., independent of whatever Western did prior to commencing hiring and with the intent of hiring regardless of source; and it offered by its seniority proposal to extend the same terms to former Western employees as it offered all others. It refused to yield to union demands that it provide any former Western employees hired with different and better seniority rights; and, by so doing, it engaged in normal bargaining.

I therefore find that WQT did not violate the Act by refusing to yield to the Union's demand it grant seniority for all purposes to any former Western employee it hired dating from his last date of hire by Western prior to going on strike.

CONCLUSIONS OF LAW

1. At times pertinent, the Union was a labor organization within the meaning of Section 2 of the Act.
2. WQT was not a successor employer to Western within the meaning of the Act.
3. The General Counsel failed to demonstrate by valid evidence WQT met the Board's jurisdictional standards.
4. The General Counsel failed to demonstrate by valid evidence the Union ever represented a majority of WQT's production and maintenance employees.
5. WQT did not violate the Act by refusing to yield to the Union's demand it grant seniority for all purposes to any Western employee it hired dating from his last date of hire by Western prior to going on strike.

Based upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I recommend the Board issue the following:

ORDER[26]

The complaint is dismissed in its entirety.

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[26] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.