

In the Matter of M. L. TOWNSEND *and* INTERNATIONAL ASSOCIATION
OF MACHINISTS

Case No. 21-CA-135.—Decided February 16, 1949

DECISION

AND

ORDER REMANDING CASE TO TRIAL EXAMINER

On October 27, 1948, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled matter, recommending that the complaint be dismissed for the reason that the Respondent is not engaged in commerce, within the meaning of the Act, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel and the Union each filed a motion to reopen the record for the purpose of adducing additional evidence with respect to the Respondent's operations. A statement in opposition thereto was filed by the Respondent.

As set forth in the Intermediate Report, the record made at the hearing, upon which the Trial Examiner recommended dismissal of the complaint, reveals the following facts bearing on the jurisdictional issue. Respondent Townsend buys and sells new and used automobiles and also operates a garage-repair service and gas station located at Santa Maria, California. During the year 1947, the Respondent's total volume of business amounted to \$346,341; used cars sales amounted to \$111,803; parts sold over the counter and installed in cars amounted to \$85,093; labor and sales of gas and oil amounted to \$97,737; new car sales amounted to \$70,770. All of the Respondent's purchases and sales of goods and services were transacted within the State. The new autos (Hudsons) were purchased from Hudson Sales Corporation, of Los Angeles, California, herein called Hudson Sales, and were picked up by the Respondent in that city.

As pointed out by the Trial Examiner, no evidence was adduced at the hearing by the General Counsel concerning the business operations of Hudson Sales, especially as to the point of origin of the automobiles sold by Hudson Sales to the Respondent. In our opinion, neither the General Counsel nor the Union has shown sufficient cause to warrant the reopening of the record to adduce such evidence. However, we take judicial notice of a prior proceeding before the Board,

in which we asserted jurisdiction over Hudson Sales.¹ In that proceeding, we found that during 1946, Hudson Sales purchased Hudson automobiles, parts, and accessories, valued in excess of \$1,000,000, of which more than 75 percent was received from points outside the State of California.

On the basis of the record herein and the findings in the above-mentioned prior proceeding, we find that a substantial portion of the Respondent's business involved the sale of new Hudson automobiles which were originally shipped from points outside the State of California. The Trial Examiner concluded, however, as the Respondent in its opposition to the motion to reopen the record now urges, that even assuming such findings of fact, this is nevertheless not a proper case for asserting jurisdiction. This conclusion is based largely on the fact that none of the cars came to the Respondent directly, or were shipped by the Respondent, across State lines. While this is a circumstance to be considered, we do not give it controlling significance in a business involving the national distribution of new automobiles on a franchise basis, which we have found not to be local in character.²

We accordingly find, contrary to the Trial Examiner and in accord with our prior decisions,³ that the Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act and that it would effectuate the policies of the Act to assert jurisdiction here, for the purpose of resolving the substantive issues raised by the complaint and of issuing an appropriate order with respect thereto.

ORDER

IT IS HEREBY ORDERED that the above-entitled proceeding be, and it hereby is, remanded to the Trial Examiner for the preparation and issuance of a Supplemental Intermediate Report, setting forth his findings of fact, conclusions of law, and recommendations with respect to the unfair labor practices alleged in the complaint herein.⁴

¹ *Matter of Hudson Sales Corporation*, 77 N. L. R. B. 378.

² *Matter of Harrys Cadillac-Pontiac Company, et al*, 81 N. L. R. B. 1; *Matter of Midtown Motors, et al*, 80 N. L. R. B. 1679; *Matter of Valley Truck and Tractor Co*, 80 N. L. R. B. 444; *Matter of Earl McMillian Company*, 81 N. L. R. B. 639

Chairman Herzog, although reluctant to exercise the Board's jurisdiction over an enterprise with so many local attributes, joins in reversing the Trial Examiner, for the reasons he stated separately in the *Earl McMillian* case. The Chairman believes that once the Board took the step it did, over his dissent, in assuming jurisdiction over retail automobile dealers in the *Liddon-White* case (76 N. L. R. B. 1181), it chose a path which should now be followed without regard to minor factual distinctions between one case and another. Any other course can only lead to confusion and uncertainty among those whose affairs are brought to the attention of the Board and its Regional Offices.

³ See cases cited in footnote 2, *supra*.

⁴ Permission is hereby granted to the parties, if they so desire, to file exceptions to this Decision, within 20 days after service of the Trial Examiner's Supplemental Intermediate Report.

INTERMEDIATE REPORT

Mr. George H. O'Brien, for the General Counsel.

Mr. Earl C. Hemme, of Santa Luis Obispo, Calif., for the Union.

Canfield & Westwick, by Messrs. *T. H. Canfield* and *T. H. Cornwall*, of Santa Barbara, Calif., for the Respondent.

STATEMENT OF THE CASE

Upon charges duly filed on April 20, 1948, and on August 20, 1948, by International Association of Machinists, herein called the Union, the General Counsel of the National Labor Relations Board, herein called the General Counsel and the Board, respectively, by the Regional Director for the Twenty-first Region (Los Angeles, California) issued a complaint dated August 26, 1948, against M. L. Townsend, herein called Respondent, alleging that Respondent had engaged in, and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the complaint, the charges, and notice of hearing thereon were duly served upon the parties.

With respect to the unfair labor practices, the complaint alleged in substance that Respondent: (1) discharged, and thereafter refused to reinstate, Ace Hutchins on April 9, 1948, and Ross Hassix and Aaron A. Thomason on April 12, 1948, because of their union activities, and (2) from on or about March 22, 1948, and continuing to the date of the complaint, (a) engaged in surveillance of meetings of his employees where matters of mutual aid and protection were discussed, (b) interrogated his employees concerning their union membership and activities, (c) threatened with discharge his employees who participated in union activity, and (d) advised his employees to relinquish their membership in the Union and refrain from participating in union activities. On or about September 10, 1948, Respondent filed an answer wherein he denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held on September 30 and October 1, 1948, at Santa Maria, California, before the undersigned Trial Examiner Martin S. Bennett, duly designated by the Chief Trial Examiner. The General Counsel and Respondent were represented by counsel, the Union by its representative, and all participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. During the hearing, Respondent moved that the complaint be dismissed on the ground that he was not engaged in interstate commerce. The motion was denied with leave to renew, and was removed at the conclusion of the hearing, at which time ruling was reserved. The motion is disposed of by the findings hereinafter made. At the conclusion of the hearing the undersigned granted a motion by the General Counsel to conform the pleading to the proof with respect to formal matters. The parties were then afforded an opportunity to argue orally before the undersigned and to file briefs and/or proposed findings of fact and conclusions of law. Oral argument was waived by the parties and, subsequent to the close of the hearing, a brief has been received from Respondent in support of his motion to dismiss the complaint.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

M. L. Townsend is an individual doing business as M. L. "Red" Townsend's Garage at Santa Maria, California, at which garage he is engaged in the purchase and sale of new and used automobiles, automotive parts and supplies, and fuels and lubricants, and also in the repair and painting of automotive vehicles. His purchase and sale of new automobiles is confined to Hudson automobiles, for which Respondent is a Master Dealer, with exclusive rights to sell Hudson vehicles within the limits of Santa Maria.

During the year 1947, Respondent's total sales for his entire business organization were in the amount of \$346,341, which included used cars valued at \$111,803, new automobile parts valued at \$84,093, and service sales valued at \$79,737.¹ All used cars handled by Respondent were bought within the State of California and sold locally in Santa Maria. This is also the case with respect to all parts purchased by Respondent, as well as his gasoline and oil sales. It is clear, and the undersigned finds that these operations of Respondent, exclusive of sales of new Hudson automobiles, are intrastate operations which do not affect interstate commerce.²

As the only other business operation of Respondent is his dealership in Hudson automobiles, a decision as to whether his business operations affect interstate commerce turns upon an analysis of said purchases and sales the facts with respect to which are as follows:

Respondent sells these automobiles through a "Hudson Distributor-Master Dealer Sales Agreement," under which he, as the Master Dealer, purchases the cars from a "Hudson Sales Corporation" of Los Angeles, California, which is the distributor and the other party to the above-named agreement. This agreement was first entered into by Respondent and the Hudson Sales Corporation of Los Angeles in 1945, at which time Respondent expanded his previously existing auto repair business to include a Hudson dealership. Respondent and the distributor are at present signatories to and operate under a renewal of the original agreement entered into on July 15, 1947. During the year 1947, the value of the new Hudson automobiles sold by Respondent was \$70,770, all of which were purchased from the distributor, Hudson Sales Corporation of Los Angeles, California, and all of which were sold by the Respondent in and about Santa Maria. All of the new Hudson automobiles which Respondent purchases from the distributor, are picked up by Respondent at the premises of the distributor in the city of Los Angeles although on one occasion in 1947 new automobiles were sent by rail to the Respondent at Santa Maria by the distributor.³ In 1948, up to the date of the hearing herein, all such purchases had been picked up by the Respondent at the premises of the distributor in Los Angeles.

The distributor, Hudson Sales Corporation, is the direct distributor in the area for the Hudson Motor Car Co., which apparently manufactures the cars, although there is no direct or indirect evidence as to the business relationship between the distributor, Hudson Sales Corporation, and the Hudson Motor Car Co., and there is no evidence of any corporate connection between the two concerns. The record is also silent as to the place of manufacture or assembly, as the case may be, of the automobiles sold by the dealer, Hudson Sales Corporation, to Respondent. The record indicates *only* that the distributor has no factory, manufactures no parts,

¹ Service sales include the labor of mechanics and sale of gas and oil.

² The record does not indicate where these parts were manufactured.

³ This shipment amounted to 1 boxcar.

and assembles no automobiles. Insofar as this record is concerned, there is no evidence of any business transactions of any sort between Respondent and the Hudson Motor Car Co., although presumably there are such. In fact, not only are all purchases of automobiles by Respondent made from the distributor, Hudson Sales Corporation, but payment is also made to the latter.⁴

The General Counsel relies upon, as an admission against interest, a mimeographed form sent to Respondent by the Regional Office of the Board, requesting certain information concerning the business operations of Respondent. In this form, which was signed by Respondent and returned to the Regional Office, the statement was made that 29 percent of Respondent's purchases of equipment which amounted to \$194,835, was new cars shipped directly to the plant from outside the State. Townsend, while on the witness stand, explained that this form was filled in by his office manager and that when he signed it there was doubt in his mind as to the accuracy of the statement concerning the purchase of new cars. In the view of the undersigned, and it is so found, Respondent's direct testimony on the stand in explanation of this form together with his independent testimony on the subject of his purchases of automobiles outweighs any adverse inference that might be drawn from the form submitted by him to the Regional Office of the Board.

Conclusions

The cases which most closely support the contention of the General Counsel that Respondent is engaged in commerce within the meaning of the Act appear to be the *Puritan Chevrolet* decision,⁵ and the *Liddon-White* decision.⁶ In the *Liddon-White* case the Board took jurisdiction over a retail truck dealer, *all of whose trucks were shipped to it from points outside the State*, and some of whose sales were made to purchasers outside the State in which it was located. In the *Puritan Chevrolet* decision, which is probably the closest on the facts to the subject case, the Board took jurisdiction over a retail car dealer, *all of whose purchases of new automobiles, valued at \$254,000 annually, were received from outside the State within which it was located, and all of whose sales were delivered within the State.*

Using the above cases as a criterion, the subject case would not support a finding that Respondent engaged in operations affecting commerce within the meaning of the Act. This is so because, as found above, all of his business operations save the purchase of new automobiles are intrastate operations, transacted within the State of California, and with respect to his dealership in Hudson automobiles, there is no evidence to show that the automobiles purchased by him from a distributor within the State of California, all of which Respondent sells locally, are manufactured or assembled outside of the State of California. The fact that Hudson Sales Corporation, located in Los Angeles, does not manufacture or assemble the Hudson cars does not constitute affirmative evidence that these cars emanate from without the State of California. Two court decisions⁷ cited by the General Counsel in support of his position are not strictly applicable herein. In these cases the respective courts took jurisdiction, firstly, over an automobile dealer engaged in the retail and wholesale sale of automobiles, and in the second case, over a dealer who was actually a

⁴ The findings herein above are largely based upon the testimony of M. L. Townsend.

⁵ *Matter of Puritan Chevrolet, Inc.*, 76 N. L. R. B. 1243.

⁶ *Matter of Liddon-White Truck Co.*, 76 N. L. R. B. 1181.

⁷ *Williams Motor Company v. N. L. R. B.*, 128 Fed. (2d) 960 (C. C. A. 8), and *N. L. R. B. v. Henry Levaux, Inc.*, 115 Fed. (2d) 105 (C. C. A. 1), cert. denied 312 U. S. 682.

distributor who delivered cars to subsidiary dealers. In both cases, there was clear evidence that the automobiles were shipped to the respective Respondents therein across State lines. In the instant case, the record lacks such evidence, and in the opinion of the undersigned, it is a fatal defect.

The instant case is perhaps closer to the *Hom-Ond Food Stores* case,⁸ where the Board declined jurisdiction over a Texas corporation operating 13 retail grocery stores in that State and purchasing goods annually valued at approximately \$3,000,000 from wholesalers and distributors located within the State of Texas. There the Board said

Here, unlike Matter of Liddon-White Truck Co., Inc., . . . *none of the goods purchased by the employer come to it directly across State lines and none of its sales are made to out-of-state customers.* Accordingly, we shall dismiss the petition herein. [Emphasis supplied.]

The undersigned accordingly finds and concludes, in view of the above, and upon the entire record in this case, that there is insufficient evidence to support a finding that Respondent is engaged in business operations affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATION

For the reasons indicated above the undersigned recommends that the complaint herein be dismissed.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board—Series 5, as amended August 18, 1948, any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report and Recommended Order or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report and Recommended Order. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46 should any party desire permission to argue orally before the Board, request therefore must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said 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.

Dated at Washington, D. C., this 27th day of October 1948.

MARTIN S. BENNETT,
Trial Examiner.

⁸ *Matter of Hom-Ond Food Stores, Inc.*, 77 N. L. R. B. 647.