In the Matter of COLLINS BAKING COMPANY *and* BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION OF AMERICA, AFL

Case No. 15–C–1303.—Decided May 13, 1949

DECISION

AND

ORDER REMANDING CASE

On October 29, 1948, without otherwise considering the merits of the case, Trial Examiner Henry J. Kent, in an "Order Dismissing Complaint," ordered that the unfair labor practice complaint herein be dismissed "because the Respondent's operations are essentially local in character," as set forth in the copy of the order attached hereto. The General Counsel requested a review of the order and filed a brief in support of his request. The Respondent filed a brief in opposition thereto.

On March 17, 1949, at Washington, D. C., the Board heard oral argument, in which the General Counsel and the Respondent participated.

The Board has considered the General Counsel's request for review,[1] the briefs, the oral argument, and the entire record in the case, and hereby makes the following findings:[2]

The Respondent, a Delaware corporation, operates a wholesale and retail bakery in Montgomery, Alabama. It annually purchases sup-

[1] The Respondent contends that the General Counsel has no standing to appeal the Trial Examiner's dismissal of the complaint on the grounds that (a) he is not a "person aggrieved" within the meaning of Section 10 (f) of the Act, and (b) he is not a "party" authorized under Section 203.27 of the Board's Rules to obtain a review of the Trial Examiner's action in dismissing the complaint. Neither contention has any merit. Section 10 (f) is inapplicable, because it deals with the right of court appeal from a *final order of the Board.* That is not the case here.

The scheme for the prevention of unfair labor practices outlined in Section 10 of the Act places upon the Board the duty to issue complaints. Section 3 (d) of the amended Act provides that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board. . . ." As the prosecutor of the unfair labor practice proceeding against the Respondent, the General Counsel, on behalf of the Board, is a party to the proceeding. See also the broad definition of the term "party" in Section 203.8 of the Board's Rules.

[2] The General Counsel contends that the Board has no discretionary power to decline to assert jurisdiction in an unfair labor practice proceeding, when jurisdiction in law exists. For the reasons stated in *Matter of H. W. Smith, d/b/a A–1 Photo Service,* 83 N. L. R. B. 564, we find this contention to be without merit.

plies valued in excess of $250,000 from outside the State of Alabama. It annually sells products valued at more than $600,000. All sales are made to customers located within the State.

The Respondent is affiliated with Campbell-Taggert Bakery Service Corporation, which owns a controlling percentage of the Respondent's common stock. Campbell-Taggert similarly controls or is interested in approximately 49 baking companies in a number of different States. The Respondent markets its products under the nationally advertised and copyrighted trade name "Colonial," which is owned and controlled by Campbell-Taggert. The latter also exercises some degree of control over the operations of the Respondent, although its precise extent was not brought out in the record.[3]

On this set of facts, we find that the Respondent is engaged in commerce within the meaning of the Act.[4] In the exercise of its discretion, the Board has generally declined to assert jurisdiction over bakeries which sell their entire product within the State of manufacture, because of the essentially local nature of the usual bakery business. But an otherwise local enterprise may lose its character as such when it becomes a link in a business which stretches over many States.[5] That is the case here. Largely because of the Respondent's affiliation with Campbell-Taggert, we find, contrary to the Trial Examiner, that it will effectuate the policies of the Act to assert jurisdiction in the present proceeding.[6] Accordingly, we shall reverse the Trial Examiner's order dismissing the complaint, and remand the case to him with instructions to prepare and issue an Intermediate Report on the merits.

ORDER

IT IS HEREBY ORDERED that the "Order Dismissing Complaint" issued herein by the Trial Examiner, be, and it hereby is, reversed; and,

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[3] The Trial Examiner erroneously found that Campbell-Taggert did not exercise control over the labor relations or business policies of the Respondent. At the oral argument, the Respondent's counsel admitted that, through its control of the Respondent's Board of Directors, Campbell-Taggert controlled the policies of the Respondent.

[4] *N. L. R. B.* v. *Schmidt Baking Company,* 122 F. (2d) 162 (C. A. 4); *N. L. R. B.* v. *Suburban Lumber Company,* 121 F. (2d) 829 (C. A. 3); *N. L. R. B.* v. *May Department Stores Company,* 146 F. (2d) 66, affirmed 326 U. S 376.

[5] Member Houston believes that the large volume of the Respondent's out-of-State purchases affords a sufficient basis for the exercise of discretion in favor of taking jurisdiction in this case.

[6] See *Matter of Riggs Optical Company, Inc.,* 81 N. L. R. B. 1171; *Matter of Rockford Coca-Cola Bottling Co.,* 81 N. L. R. B. 579; *Matter of Raleigh Coca-Cola Bottling Co,* 80 N. L. R. B. 768; *Matter of Baking Industry Council,* 80 N. L R. B. 1590; *Matter of Carnation Company of Texas,* 78 N. L. R. B 519; *Matter of Orkin Termite Company, Inc.,* 79 N. L. R. B. 935; *Matter of Hertz Drv-Ur-Self Stations, Inc.,* 78 N L R B 422; cf *Matter of Fehr Baking Company,* 79 N. L. R B 440, relied upon by the Trial Examiner, where we refused to assert jurisdiction over nine bakeries in Houston, Texas. In that case, however, only one of the nine bakeries was affiliated with a national enterprise.

IT IS FURTHER ORDERED that the above-entitled case be, and it hereby is, remanded to the Trial Examiner for the purpose of preparing and issuing an Intermediate Report, setting forth his findings of facts, conclusions of law, and recommendations with respect to the unfair labor practices alleged in the complaint herein.

ORDER DISMISSING COMPLAINT

Andrew P. Carter, Esq., Charles A. Kyle, Esq. and *C. Paul Barker, Esq.*, for the General Counsel.

Fred S. Ball, Jr., Esq., of Montgomery, Ala., for the Respondent.

Mr. Curtis R. Sims, of Chattanooga, Tenn., for the Union.

STATEMENT OF THE CASE

Upon a charge filed on November 15, 1946, by Bakery and Confectionery Workers International Union of America, AFL, herein called the Union, the General Counsel of the National Labor Relations Board,[1] by the Regional Director for the Fifteenth Region (New Orleans, Louisiana) issued a complaint dated April 28, 1948, against Collins Baking Company, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) of the National Labor Relations Act, 49 Stat. 449, herein called the Act, and Section 8 (a) (1) and (5) of the Labor Management Relations Act, 61 Stat. 136, herein called the amended Act, and Section 2 (6) and (7) of the Act and the amended Act. Copies of the complaint, the charge and notice of hearing were duly served upon the Respondent and the Union. Thereafter Respondent duly filed its answer admitting the factual allegation in the complaint regarding its business operations but denying that it was engaged in commerce within the meaning of the Act and further denying the commission of any of the unfair labor practices alleged.

Pursuant to notice a hearing was held on June 8 and 9, 1948, at Montgomery, Alabama, before the undersigned Trial Examiner duly designated to conduct a hearing by the Chief Trial Examiner. The General Counsel and the Respondent were each represented by counsel and the Union by one of its International vice-presidents. 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 the parties.

At the opening of the hearing, Counsel for the Respondent stated that by participating in the hearing, Respondent was not waiving its right to insist upon its defense that the Board lacked jurisdiction for the asserted reason that the Respondent was not engaged in commerce within the meaning of the Act. The undersigned ruled that participation in the hearing would not constitute a waiver of that defense.

At the close of the hearing, the parties were afforded, but waived, an opportunity to present oral argument. They were granted 15 days to submit briefs to the undersigned. Thereafter time to file briefs was extended and briefs and supplemental briefs have been submitted by the General Counsel and the Respondent.

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[1] The General Counsel and his representative at the hearing are referred to herein as the General Counsel. The National Labor Relations Board is referred to as the Board.

After the close of the hearing, the Regional Director of the Fifteenth Region filed a motion with the undersigned on July 14, 1948, to reopen the record for the purpose of receiving proof of service of a copy of the charge filed on November 15, 1946 by the Union and thereafter served upon the Respondent on June 30, 1947, which proof of service by inadvertence had not been offered in evidence at the hearing. On July 16, 1948, the undersigned issued an order and caused same to be duly served upon the Respondent, the said order providing that unless Respondent show cause by July 26, 1948, why the record should not be reopened to admit the proffered proof of service of the said charge, the undersigned would order the record reopened to receive it. Absent objection from the Respondent, it is hereby ordered that the record be reopened for the purpose of receiving the said proof of service of the charge in evidence. The undersigned has marked the said motion made by the Regional Director as Trial Examiner's Exhibit I, the above-mentioned Order to Show Cause as Trial Examiner's Exhibit II, and said proof of service of the charge filed by the Union indicating that service of a copy of the charge had been duly served on July 2, 1947, as Trial Examiner Exhibit III. He hereby orders that the record be reopened to receive in evidence the three exhibits designated above and he has inserted them in the Exhibit file.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The complaint alleges in substance: Respondent, a corporation organized under the laws of the State of Delaware, is engaged in the purchase, manufacture, and sale, at wholesale and retail of bread, cake and other bakery products at its headquarters maintained at Montgomery, Alabama; that Respondent markets its products and other merchandise under the trade names of "Colonial," "Fair Maid," and "Rainbow," nationally advertised trade names that have been copyrighted and which are owned or controlled by Campbell-Taggert Bakery Service Corporation, which concern owns a controlling percentage of Respondent's common stock and also of similar stock in other bakery concerns, not involved herein, severally engaged in operating bakery enterprises in the States of Virginia, Ohio, Michigan, Georgia, and Texas;[2] that Respondent annually purchases and causes to be delivered to its plant at Montgomery, Alabama, raw materials, supplies, and merchandise for resale, at wholesale and retail, of an annual value exceeding $250,000; that the annual value of Respondent's sales, all of which are made within the central portion of the State of Alabama exceed $600,000; and that unlawful activities of Respondent occurring in connection with its operation have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Respondent admitted in its answer the factual allegations in the complaint concerning its business operations but denied that it is engaged in commerce within the meaning of the Act and also denied the commission of any of the unfair labor practices alleged. In addition, the record shows that Respondent asserted at the opening of the hearing it was not waiving its asserted defense regarding jurisdiction by participating in the hearing.

[2] Campbell-Taggert Bakery Service is not a party to this proceeding. Insofar as the record shows Campbell-Taggert has no voice in determining the labor relations or business policies of the Respondent.

The complaint does not allege nor does the evidence show that Respondent sold or shipped any of the products manufactured or purchased by it to vendees located in States other than the State of Alabama.

II. THE ORGANIZATION INVOLVED

Bakery and Confectionery Workers International Union of America, AFL, is a labor organization admitting to membership employees of the Respondent.

Conclusions

Respondent's second supplemental brief filed with the undersigned on October 1, 1948, stated that it had not urged its defense regarding the effect of its business operations upon commerce in its briefs previously filed because the courts had upheld earlier decisions issued by the Board wherein the Board had concluded and found that the purchase of a substantial percentage of goods or materials purchased and shipped to an employer from vendors located in other States for processing or resale was sufficient to give the Board jurisdiction of the cause under the provisions of the Act absent any sales and shipments of goods by the employer to vendees located in other States.

Counsel for Respondent, further contends that a change in the Board's position has been recently effected and that the Board in effect now holds, that it will not effectuate the purposes of the Act for the Board to assert jurisdiction in cases where substantially all sales of goods are made to persons residing in the State where the principal business operations are carried on. In support of this contention, he cites, among others, the following cases: *Matter of Fehr Baking Company* and *International Association of Machinists* (16–R–2390), 79 N. L. R. B. 440; *Federal Bakery, Inc., et al.* and *Bakery and Confectionery International Union of America, AFL* (16–R–2402), 79 N. L. R. B. 440. According to the Board's decision issued on or about September 2, 1948, in the above cases, which were consolidated for the purposes of hearing, the nine concerns involved each operate large bakery enterprises in the City of Houston, Texas. All sales by the several employers were made to persons located in and about the City of Houston and its suburban communities. The value of the sales by each of several of the concerns involved was substantially as large as those of the Respondents herein and the value of materials purchased or originating from outside the State of Texas in some cases exceeded the value of such purchases made by the Respondent herein. Although the Board's decision in the above-cited cases does not clearly indicate whether either of the employees concerned were affiliated with other chain bakery enterprises, the record indicates that the National Bread Company, one of the employers concerned in the so-called Houston consolidated bakery cases was a division of the National Biscuit Company.

Following a hearing in the above consolidated bakery cases, the Board held:

> Inasmuch as the bakery businesses herein concerned are all operations essentially local in character, we find that it will not effectuate the policies of the Act to assert jurisdiction in either of the consolidated cases before us. For this reason, we shall dismiss the instant petitions, and will not pass upon the several substantive issues raised by the parties to these proceedings.

In view of this decision by the Board, the controlling consideration would seem to be based upon a determination as to whether or not the business operations of an employer is predominantly local in nature.

The Board made no preliminary determination regarding whether or not a question of representation affecting commerce existed in the instant case, or whether the unit agreed upon was appropriate. Pursuant to a consent election agreement in evidence an election was held by a United States Commissioner of Conciliation within an agreed upon unit.

In the opinion of the undersigned, the operation of the business conducted by the Respondent herein is substantially similar to the business conducted by the several employers in the so-called consolidated Houston bakery cases. Accordingly, the undersigned is of the opinion that the defense urged by the Respondent herein has substantial merit because the business operations of the Respondent are predominantly of a local nature.[3]

Upon consideration of all the above and without considering the merits regarding the contentions of the parties in regard to the unfair labor practices alleged in the complaint, the undersigned is of the opinion that the complaint should be dismissed because the Respondent's operations are essentially local in character.

IT IS HEREBY ORDERED that the complaint herein be dismissed.[4]

Dated at Washington, D. C., this 29th day of October 1948.

HENRY J. KENT,
Trial Examiner.

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[3] See also *Matter of Wawina Co-Op Society et al.*, 79 N. L. R. B. 1243.

[4] Section 203 27 of the Board's Rules and Regulations, Series 5, provides:

> If any motion in the nature of a motion to dismiss the complaint in its entirety is granted by the Trial Examiner before filing his Intermediate Report, any party may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., stating the grounds for review, and immediately on such filing shall serve a copy thereof on the Regional Director and the other parties. Unless such request for review is filed within 10 days from the date of the order of dismissal, the case shall be closed.