

In the Matter of ARTHUR D. THOMSON, AN INDIVIDUAL, DOING BUSINESS
AS CREAM TOP DAIRY and TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS LOCAL UNION No. 983

Case No. 19-CA-27.—Decided May 20, 1949

DECISION

AND

ORDER

On March 17, 1949, Trial Examiner Josef L. Hektoen issued his Intermediate Report in the above-entitled proceeding, finding that the activities of the Respondent are of an essentially local nature and that it would not effectuate the policies of the Act to assert jurisdiction. Accordingly, he recommended that the complaint be dismissed, setting forth his reasons in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and filed a brief in support of his exceptions.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner. For the reasons stated in *Matter of A-1 Photo Service*, 83 N. L. R. B. 564, we find without merit the General Counsel's contention that the Board does not have discretionary authority to dismiss a complaint on the ground that it would not effectuate the policies of the Act to assert jurisdiction. Because of the local nature of the Respondent's business, we will exercise that authority herein and will dismiss the complaint.¹

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor

¹ *Matter of Gullford Dairy Cooperative Association, Inc.*, 81 N. L. R. B. 1334; *Matter of Creamland Dairies, Inc.*, 80 N. L. R. B. 106; *Matter of Purity Creamery Company*, 79 N. L. R. B. 1042.

83 N. L. R. B., No. 112.

Relations Board hereby orders that the complaint issued herein be, and it hereby is, dismissed.

CHAIRMAN HERZOG and MEMBER GRAY took no part in the consideration of the above Decision and Order.

INTERMEDIATE REPORT

Mr. Robert E. Tillman, for the General Counsel.

Mr. George L. Barnard, of Idaho Falls, Idaho, for the respondent.

Mr. Clarence Lott, of Idaho Falls, Idaho, for the Union.

STATEMENT OF THE CASE

Upon an amended charge filed on September 27, 1948, by Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 983, herein called the Union, the General Counsel of the National Labor Relations Board,¹ by the Regional Director for the Nineteenth Region (Seattle, Washington), issued his complaint dated October 22, 1948, against Arthur D. Thomson, an individual, doing business as Cream Top Dairy, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices, within the meaning of Section 8 (a) (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, as amended by the Labor Management Relations Act, 61 Stat. 136, herein called the Act. Copies of the complaint and the amended charge, accompanied by notice of hearing thereon were duly served upon the Respondent and the Union.

With respect to the unfair labor practices the complaint alleged in substance that the Respondent: (1) from about January 1, 1948, engaged in violations of Section 8 (a) (1) of the Act by various specified means; (2) on about January 14, 1948, discharged and thereafter refused to reinstate George Moore, and on about February 14, 1948, discharged and thereafter refused to reinstate Mervin Fisher, both because of their membership in and activities on behalf of the Union; (3) on about January 13, 1948, and thereafter, failed and refused to bargain collectively with the Union which was then and now is the exclusive representative of the Respondent's employees in a unit appropriate for the purposes of collective bargaining; and (4) by such acts interfered with, restrained, and coerced his employees in the exercise of rights guaranteed in Section 7 of the Act.

The Respondent thereafter filed his answer denying the allegations of the complaint as to his business and its effect upon commerce, within the meaning of the Act, and the commission of any unfair labor practices.

Pursuant to notice, a hearing was held on January 25, 26, and 27, 1949, at Idaho Falls, Idaho, before the undersigned Josef L. Hektoen, the Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and the Respondent were represented by counsel; the Union by its representative. All participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. At the close of the hearing, the General Counsel moved to conform the pleadings to the proof in formal matters; the motion was allowed without objection. Oral argument was waived; after the close of the hearing,

¹ The General Counsel and his representative at the hearing are herein called the General Counsel and the National Labor Relations Board is called the Board.

the General Counsel and counsel for the Respondent filed briefs with the undersigned. Also after the close of the hearing, the General Counsel moved to make certain corrections in the transcript of the record; the motion was granted and the corrections made by the undersigned.

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 THE RESPONDENT

The Respondent, Arthur D. Thomson, is an individual doing business in Idaho Falls, Idaho, as Cream Top Dairy. He there conducts a milk bottling and distributing concern the products of which are milk, cream, buttermilk, cottage cheese, chocolate milk, and orange juice.²

During 1947, the Respondent bought milk and cream, all from producers within the State of Idaho, valued at \$166,627.82; his total sales during 1947 were valued at \$271,741.83, of which but 2.5 percent were made to points without the State.³

During 1948, the Respondent bought milk and cream, all from producers within the State of Idaho, valued at \$217,373.55; his total sales during 1948, were valued at \$354,872.82, of which none were made to points outside the State of Idaho.

As to supplies, the Respondent buys mainly bottles, caps therefor, washing powders, and cottage cheese cartons. During 1947, he bought such commodities from suppliers within the State of Idaho valued at \$1,253.75, and from out-of-state suppliers valued at \$11,647.20; during 1948, he bought supplies from within the State of Idaho valued at \$8,636.97, and from out-of-state suppliers valued at \$8,887.39.⁴

During 1947, the Respondent bought equipment valued at \$7,829.86, and during 1948, equipment valued at \$90.⁵

CONCLUSIONS

The undersigned does not purport to say whether, as a matter of law, the Respondent's activities affect commerce, within the meaning of the Act. He is guided, in what will be the recommended dismissal of the proceeding, largely by the Board's decision in *Hom-Ond Food Stores, Inc.* (77 N. L. R. B. 647), holding that to assert jurisdiction over a chain of retail grocery stores doing a business of \$4,000,000 annually, some 25 percent of its \$3,000,000 annual purchases having originated from without the State of Texas, where all of its thirteen stores were located, would not "effectuate the statute's policies . . ." To be sure, a quantity of supplies, and some equipment, come to the Respondent in the instant case from across state lines. However, in the opinion of the under-

² No specific figures respecting purchases of buttermilk, cottage cheese, and chocolate milk, nor of orange juice, appear in the record

³ The out-of-Idaho sales were made during the summer of 1947, to the neighboring Jackson Hole territory in Wyoming on account of an emergency there. They were discontinued entirely during October of that year since which time no out-of-state sales of any nature have been made.

⁴ The Respondent's principal Idaho supplier, Rocky Mountain Dairy Supply Company, Idaho Falls, Idaho, obtains substantially all of its supplies from without the State of Idaho.

⁵ The rather heavy 1947 purchases were caused by a backlog of unfilled war-time orders and were, as is shown by the record, nonrecurring items.

signed, they are so small as to render the concern an inhabitant of that area which the Board has frequently defined as "essentially local." ⁶

The undersigned cannot, in the absence of Board authority to the contrary, make differentiation as to assertion of jurisdiction between the cases cited, representation matters, and the instant matter, a complaint case. He finds no warrant therefor in the Act and perceives of none elsewhere.⁷

RECOMMENDATIONS

For the reasons above set forth, the undersigned recommends that the complaint herein be dismissed.

As provided in Section 203.46⁶ 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 and 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 therefor 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 17th day of March 1949.

JOSEF L. HEKTOEN,
Trial Examiner.

⁶ See, for example, *Matter of Creamland Dairies, Inc.*, 80 N. L. R. B. 106, in which the Board dismissed a representation petition involving a business purchasing about twenty-five percent, or \$125,000, of its raw materials from points without the state of which it was resident, and sold in excess of a million dollars' valuation of finished products, all within the State of New Mexico.

⁷ Under the Act, the General Counsel administratively asserts jurisdiction, and it is not until a hearing is held and an Intermediate Report issues, that the Board has judicial opportunity to rule upon the matter. It appears to devolve, therefore, upon the Trial Examiner to make recommendations in the premises when the question is, as here, in issue.