

In the Matter of BERT AND BETTY MILLAGE D/B/A BETTY AND BERT'S
MARKET and WALTER E. OSBURN, AN INDIVIDUAL

Case No. 21-CA-290.—Decided November 25, 1949

DECISION

AND

ORDER

On September 26, 1949, Trial Examiner Sidney Lindner issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents' business was essentially local in character, and recommending that the complaint be dismissed on the ground that it would not effectuate the policies of the Act to assert jurisdiction in this case, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel and the Respondents filed exceptions to the Intermediate Report and supporting briefs. The Intervenor, Betty and Bert Employees Association, also filed exceptions.

The Board¹ has reviewed the rulings of 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 briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.²

The General Counsel, the Respondents, and the Association contend, however, that the Board does not possess discretionary authority to decline to assert jurisdiction on the ground that it will not effectuate the policies of the Act to do so. For the reasons set forth in the *A-1 Photo* and *Haleston* cases,³ we find no merit in this contention. We shall therefore dismiss the complaint herein.⁴

¹ Pursuant to the provisions of Section 3 (b) of the Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Houston and Gray].

² In addition to the cases cited in the Intermediate Report, see also *Hubby-Reese Company*, 72 NLRB 1404; *Conlon Baking Company*, 81 NLRB 934; *Jacobs Pharmacy Co.*, 87 NLRB 309.

³ *H. W. Smith d/b/a A-1 Photo Service*, 83 NLRB 564; *Haleston Drug Stores, Inc.*, 86 NLRB 1166.

⁴ In view of our disposition of this case on jurisdictional grounds, we, like the Trial Examiner, find it unnecessary to pass on the merits of the alleged unfair labor practices. Accordingly, we hereby deny the motions of the General Counsel, the Respondents, and the Association, to remand the case to the Trial Examiner for a Supplemental Intermediate Report containing his findings of fact, conclusions of law, and recommendations, with respect to commerce and the unfair labor practices alleged in the complaint.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint against Bert and Betty Millage d/b/a Betty and Bert's Market, San Bernardino, California, be, and it hereby is, dismissed.

INTERMEDIATE REPORT

Messrs. George H. O'Brien and Ralph Nutter, for the General Counsel.
Mr. Taylor F. Peterson, of San Bernardino, Calif., for the Respondents.
Mr. William B. Irvin, of Los Angeles, Calif., for the Individual.
Mrs. Edwin Selvin, of Beverly Hills, Calif., for the Employees Association.

STATEMENT OF THE CASE

Upon a charge filed on December 7, 1948, by Walter E. Osburn, an individual, herein called Osburn, the General Counsel of the National Labor Relations Board,¹ by the Regional Director for the Twenty-first Region (Los Angeles, California), issued his complaint dated February 10, 1949, against Bert and Betty Millage, doing business as Betty & Bert's Market, herein called the Respondents, alleging that the Respondents had engaged in and were engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (a) (2) 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 charge and the complaint accompanied by notice of hearing thereon were duly served upon the Respondents, the individual, and the Bert and Betty Millage Employees Association, herein called the Association.

With respect to the unfair labor practices, the complaint alleged in substance that the Respondents: (1) on or about October 18, 1948, through their agents, employees, and relatives formed, assisted, and supported the Bert and Betty Millage Employees Association as a labor organization to represent their employees; (2) on or about October 18, 1948, and at other times prior to and including the date of the issuance of the complaint herein, dominated, supported, and interfered with the operations and administration of the Bert and Betty Millage Employees Association by causing and inducing their agents, employees, and relatives to organize the Association by furnishing financial and other support to their agents, employees, and relatives for expenses in organizing the Association, and by causing and inducing their agents, employees, and relatives to dominate and interfere with the administration of the Association; and (3) by such acts interfered with, restrained, and coerced their employees in the exercise of rights guaranteed in Section 7 of the Act.

The Respondents duly filed an answer admitting the allegations of the complaint with respect to their business but denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held on July 19, 20, and 21, 1949, at San Bernardino, California, before the undersigned, the Trial Examiner duly designated by the acting Chief Trial Examiner. The General Counsel, the Respond-

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

ents, and the individual were represented by counsel; the Association 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, the General Counsel and counsel for the Respondents filed briefs with 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 RESPONDENTS²

The Respondents, Bert and Betty Millage, are husband and wife, partners, doing business under the name of Betty & Bert's Market, in the operation of a retail food market, cafe, and watermelon stand, all under one roof in San Bernardino, California.

During 1948, the Respondents, in the course and conduct of their business, purchased meats, dry groceries, fruits and vegetables, dairy products, bakery products, beer, and wine valued at \$177,385.21. All such purchases were made locally from California suppliers and jobbers. During the first 6 months of 1949, the Respondents bought similar products valued at \$88,502.36 locally from California suppliers and jobbers. During the 18-month period herein described, the only purchases of merchandise from without the State of California were dye stuffs in the amount of \$139 shipped directly to the Respondents from Moline, Illinois. The Respondents' total sales for the 18-month period were in the amount of \$314,035.80. All sales were made at their store in the city of San Bernardino for local consumption.

The Respondents are members of Certified Grocers of California, Limited,³ a nonprofit buying cooperative whose 1,200 members operated 1,350 retail outlets in the States of California, Arizona, Nevada, Utah, and the Territory of Hawaii.⁴ The cooperative's annual sales are in excess of \$86,000,000, and approximately 60 percent of the items handled by it originate outside the State of California. During 1948, the Respondents sole purchases from the cooperative were dry groceries⁵ in the value of \$36,600.89.

Conclusions

It is apparent from the foregoing that the Respondents' operations are "essentially local" in character.⁶ The General Counsel points out however that approximately 56 percent of the Respondents' purchases made within the State of Cali-

² The findings in this section are based upon a stipulation of the parties entered into at the hearing.

³ Requisites for membership in the cooperative are the purchase of 10 shares of common stock in the value of \$200.

⁴ Less than 5 percent of the members' stores are located in States other than the State of California. The member stores in California are concentrated for the most part in Southern California.

⁵ Dry groceries include canned goods, packaged foods, and household sundries.

⁶ See, for example, *Creamland Dairies, Inc.*, 80 NLRB 106, in which the Board dismissed a representation petition involving a business purchasing about 25 percent, or \$125,000 of its raw materials from points without the State of which it was resident, and sold in excess of a \$1,000,000 valuation of finished products all within the State of New Mexico.

ifornia consisted of goods originating outside the State. The undersigned does not consider it necessary to decide whether this furnishes a basis as a matter of law for finding that the Respondents' activities "affect commerce."⁷ In recommending the dismissal of this proceeding the undersigned is guided by the Board's recent decisions in several cases including the *Hom-Ond Food Store, Inc.*, case, 77 NLRB 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 13 stores were located, would not "effectuate the statute's policies. . . ."⁸

RECOMMENDATIONS

For the reasons above set forth, 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, 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, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report 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. 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 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.

Signed at Washington, D. C., this 26th day of September 1949.

SIDNEY LINDNER,
Trial Examiner.

⁷ See however, *San Diego Ice and Cold Storage Company*, 17 NLRB 422.

⁸ See the following cases also. *Bangor Auto Body Shop*, 82 NLRB 688; *Advance Welding Works*, 81 NLRB 199; *Matter of Haleston Drug Stores, Inc.*, 82 NLRB 1264; *A-1 Photo Service*, 83 NLRB 564.