

In the Matter of MERRILL CONSTRUCTION Co., INC., and IGNATIUS KRZYWINSKI, AN INDIVIDUAL

In the Matter of INTERNATIONAL HOD CARRIERS' BUILDING & COMMON LABORERS' UNION OF AMERICA, LOCAL 210, AFL and IGNATIUS KRZYWINSKI, AN INDIVIDUAL

Cases Nos. 3-CA-191 and 3-CB-53.—Decided November 15, 1950

DECISION AND ORDER DISMISSING COMPLAINT

On July 12, 1950, Trial Examiner Albert P. Wheatley issued an order granting the Respondents' motions to dismiss the complaints in the above-entitled proceedings on the ground that the assertion of jurisdiction would not effectuate the policies of the National Labor Relations Act. Thereafter, the General Counsel filed a request for review of the Trial Examiner's order.

To the extent here material, the Board¹ has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the order issued by the Trial Examiner, a copy of which is attached hereto, the General Counsel's request for review, and the applicable portion of the record in the case. We agree with the Trial Examiner that although the operations of the Respondent Company are not wholly unrelated to interstate commerce, the assertion of jurisdiction would not effectuate the policies of the Act.² Accordingly, we shall affirm the Trial Examiner's order dismissing the complaints herein.

ORDER

IT IS HEREBY ORDERED that the complaints issued herein against the Respondents, Merrill Construction Co., Inc., and International Hod

¹ Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with these cases to a three-member panel [Members Houston, Murdock, and Styles].

² The extent of the Respondent Company's operations are fully set forth in the Trial Examiner's Order Dismissing Complaint. These operations, considered individually or in combination, do not meet the minimum requirements for assertion of jurisdiction as established by the Board's recently announced standards. Cf. *The Rutledge Paper Products, Inc.*, 91 NLRB 625; *Dorn's House of Miracles, Inc.*, 91 NLRB 632; *Federal Dairy Co., Inc.*, 91 NLRB 638.

92 NLRB No. 26.

Carriers' Building & Common Laborers' Union of America, Local 210, AFL, be, and they hereby are, dismissed.

ORDER DISMISSING COMPLAINT.

Upon charges duly filed by Ignatius Krzywinski, an individual, the General Counsel of the National Labor Relations Board by the Regional Director for the Third Region (Buffalo, New York) duly issued complaints dated May 5, 1950, against Merrill Construction Co., Inc., hereinafter called the Respondent Company, and against International Hod Carriers' Building and Common Laborers' Union of America, Local 210, AFL, herein called Respondent Union (Respondents are collectively referred to as Respondents) alleging that Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 8 (b) (1) (A) and (2), respectively, and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. By order dated May 5, 1950, said Regional Director duly consolidated these cases.

Thereafter Respondents filed separate answers denying the commission of any unfair labor practice.

Pursuant to notice a hearing was held on May 22 and 23, 1950, at Buffalo, New York, before the undersigned Trial Examiner. The General Counsel, Respondent Company, and Respondent Union were represented by counsel and participated in the hearing.¹ All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. At the conclusion of the General Counsel's case-in-chief, counsel for each of the Respondents moved to dismiss the complaint and did not offer any evidence on Respondent's behalf. After oral argument on the record by counsel for the respective parties, the undersigned took the motions under consideration. After the close of the hearing a brief was received from the General Counsel. The undersigned has considered the applicable portions of the record in the case and the brief filed by the General Counsel and now disposes the motion to dismiss in accordance with the following findings and conclusions.

Respondent Company, a New York corporation having its office and place of business in Buffalo, New York, engages, as a general contractor, in the construction of buildings and projects and in connection therewith acts as a broker in real estate and insurance.

In the course and conduct of its construction enterprise Respondent Company purchases and uses various building supplies including lumber, steel, hardware, and bathroom and kitchen equipment. Its expenditures for such materials and supplies during the period October 1948 to October 1949 approximated \$140,000.

Respondent Company purchases substantial quantities of lumber and other building supplies from Sloan Lumber Company, Inc., herein called Sloan, a New York corporation doing business in Sloan, New York.² Respondent Company's purchases from Sloan during 1949 approximated \$92,000 and about \$30,000 represents lumber purchased by and shipped to Sloan from outside New York and resold by Sloan from its regular stock-in-trade to Respondent Company. The balance of the supplies and equipment, including manufactured and mill work items, sold by Sloan to Respondent Company were secured by Sloan from

¹ The General Counsel's representative is herein called the General Counsel.

² Suburb of Buffalo.

within New York. The origin of these supplies and equipment is not revealed except that some of them were milled within the State of New York.

During 1949 Sloan's total purchases approximated \$238,000 and from \$50,000 to \$60,000 represents materials and supplies received by Sloan from outside New York. During this same period Sloan's sales approximated \$305,000, practically all of which were made within the State of New York.

With respect to the relationship between Respondent Company and Sloan there is no evidence indicating joint management, accounts, personnel, or records, including payroll lists, no evidence of commingling of personnel between the two companies, and no evidence that either company exerts any control over the labor policies of the other. There is no evidence that Respondent Company owns stock in Sloan or that the latter company owns stock in Respondent Company. Also, none of the officers of the Respondent Company are officers of Sloan and, except for William H. Merrill, Sr., the directors of each corporation are separate individuals. Nevertheless, William H. Merrill, Sr., president, chairman of the board of directors, and majority stockholder of Respondent Company is also chairman of the board of directors and majority stockholder of Sloan. James Howard Merrill, son of William H. Merrill, Sr., is secretary and treasurer of Sloan and a minority stockholder of Respondent Company and of Sloan. Raymond Leary, president of Sloan and Nelson Borchert, vice president of Sloan, are also minority stockholders of Respondent Company. William H. Merrill, Sr., testified that he has his "own auditor" audit the books of Sloan and that there are instances where he calls the officials of Sloan "in during conferences or meetings" held by Respondent Company.

There is no evidence that Respondent Company is a member of General Contracting Employers Association, (see *Carpenter & Skaer Inc. and General Contracting Employers Association*, 90 NLRB 417).

During the year 1949 Respondent Company constructed a residential apartment project, known as Richmond Courts, in Buffalo, New York. The total cost of this project approximated \$243,000 including approximately \$148,000 to subcontractors. Approximately \$55,000 represents Respondent Company's expenditure for supplies and material for this project and subcontractors expended, for supplies and materials, approximately \$52,000. There is no showing that any of the supplies and materials used on this project came directly to the project from outside New York. However, it was stipulated that from 10 to 15 percent of all supplies and equipment used on this project originated outside New York, but were purchased by Respondent Company and the subcontractor from jobbers or suppliers located within New York. The record establishes that some, if not all, of said supplies and materials were received by the jobbers or suppliers from points and places outside New York.

Between October 1948 and October 1949, Respondent Company constructed a residential apartment project, known as Harlem Court Extension, in Buffalo, New York. The total cost of this project approximated \$190,000 including \$120,000 to subcontractor and \$40,000 worth of supplies and equipment purchased by Respondent Company. Subcontractor's purchases of supplies and equipment for this project approximated \$42,000. There is no showing that any of the supplies and equipment used on this project came directly to the project from outside New York. It was stipulated that 10 to 15 percent thereof had their origin outside New York but were received by the Respondent Company and the subcontractors in New York from local jobbers and suppliers.

It was stipulated:

That during the year 1949, the Merrill Construction Company in the course of engaging in the insurance business as brokers, placed various insurance³ totalling a face value of \$1,800,000 with various agents representing approximately 30 insurers; that of this amount approximately 30 per cent of the \$1,800,000 was placed with insurers who do business in states other than the State of New York; and that Merrill Construction Company received as commissions during this period approximately \$1,500, and that the premiums were about \$18,000 for the policies so placed.

The facts in the instant matter reveal that a large amount of materials, supplies, and equipment used by Respondent Company and on the projects involved herein originated outside New York but there is no evidence that any of such materials, supplies, and equipment were shipped directly to Respondent Company or to the projects from outside the State. It is the policy of the Board to decline to exercise jurisdiction in this industry on the ground that such operations are essentially local in character, except where the facts point to a direct and substantial effect on commerce (see *Denver Building and Construction Trades Council*, 90 NLRB 378; and *Carpenter & Skaer Inc., et al.*, 90 NLRB 417; *Local 596, IBEW (West Virginia Electric Corp.)*, 90 NLRB 417; and *Glaziers' Union No. 27 (Joliet Contractors Association)*, 90 NLRB 542.

The General Counsel contends that in view of Respondent Company's operations as an insurance broker and in view of the relationship between Respondent Company and Sloan, the instant matter is distinguishable from cases previously decided by the Board. The General Counsel contends that Respondent Company and Sloan are so integrated that the question of commerce and of the assertion of jurisdiction must be viewed in the light of operations of both companies. There is more than the usual relationship of buyer and seller between Respondent Company and Sloan. Nevertheless, the facts indicate separate enterprises rather than an integrated one⁴ and it is believed that the relationship between Respondent Company and Sloan is not sufficiently close to warrant a deviation from the policy of the Board so as to assert jurisdiction with respect to Respondent Company.

Concerning the insurance phase of Respondent Company's operations it is noted that Respondent Company is not an insuring enterprise but merely acts as an insurance broker in connection with its construction and real estate business. The undersigned does not consider this of sufficient moment to distinguish the instant matter from cases in this industry previously decided by the Board and believes that Respondent Company's insurance operations are readily distinguishable from operations involved in cases where the Board has exercised jurisdiction over insurance companies.

Accordingly, the undersigned concludes that while the operations of Respondent Company are substantially and not wholly unrelated to interstate commerce, they are, nevertheless essentially local in character and that it would not effectuate the policies of the Act to assert jurisdiction in these cases.

Respondents' motions urging dismissal on jurisdictional or commerce grounds are therefore granted and it is hereby ordered that complaints herein, and each of them, be, and they hereby are, dismissed in their entirety.

³ Fire insurance.

⁴ See *John F. Kaenel and George Von Kaenel, d/b/a Acme Corrugated Box Co., and John F. Kaenel Cooperage Co.*, 88 NLRB 96; and *W. E. Whitfield, Jr., et al., d/b/a Whitfield Bus Lines*, 88 NLRB 261; cf. *Don Juan Co., Inc. and Don Juan, Inc.*, 79 NLRB 154 (enforced, except as to an award of back pay, 178 F. 2d 625 CA 2).

Any party may obtain a review of the foregoing order, pursuant to Section 203.23 of the Rules and Regulations of the Board, by filing a request therefor with the Board, stating the grounds for review, and immediately upon such filing serving a copy thereof on the Regional Director and the other parties. Unless such request for review is filed within ten (10) days from the date of this order of dismissal, the cases shall be closed.