In the Matter of CARPENTER & SKAER, INC., AND GENERAL CONTRACTING EMPLOYERS ASSOCIATION *and* GEORGE MCDONALD

In the Matter of INTERNATIONAL HOD CARRIERS', BUILDING & COMMON LABORERS' UNION OF AMERICA, LOCAL 210, AFL *and* GEORGE MCDONALD

In the Matter of INTERNATIONAL HOD CARRIERS', BUILDING & COMMON LABORERS' UNION OF AMERICA, LOCAL 210, AFL *and* ROBERT H. FRANCISCO

In the Matter of H. F. STIMM, INCORPORATED AND GENERAL CONTRACTING EMPLOYER ASSOCIATION *and* HAROLD ODELL

In the Matter of INTERNATIONAL HOD CARRIERS', BUILDING & COMMON LABORERS' UNION OF AMERICA, LOCAL 210, AFL *and* HAROLD ODELL

In the Matter of ANTHONY SANUCCI, SR. *and* JOSEPH TONTILLO

In the Matter of INTERNATIONAL HOD CARRIERS', BUILDING & COMMON LABORERS' UNION OF AMERICA, LOCAL 210, AFL *and* JOSEPH TONTILLO

In the Matter of STRAUBINGER CONSTRUCTION CO., INC. *and* ALBERT NAPPO AND HARRY ERVIN

In the Matter of INTERNATIONAL HOD CARRIERS', BUILDING & COMMON LABORERS' UNION OF AMERICA, LOCAL 210, AFL *and* ALBERT NAPPO AND HARRY ERVIN

Cases Nos. 3-CA-86, 3-CB-21, 3-CB-26, 3-CA-150, 3-CB-36, 3-CA-152, 3-CB-37, 3-CA-172, and 3 CB-45.—Decided June 19, 1950

DECISION

ORDER DISMISSING CERTAIN COMPLAINTS

AND

ORDER REMANDING PROCEEDING TO TRIAL EXAMINER

On November 1, 1949, Trial Examiner Charles W. Whittemore issued an order granting the Union's motion 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.[1] Thereafter, the General Counsel filed a request for review of the Trial Examiner's order and the Union filed a reply thereto. A supporting brief was filed by the General Counsel.

To the extent here material the Board 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, the briefs of the parties, and the applicable portion of the record in the case.[2] We agree with the Trial Examiner that although it does not appear that the operations of Employers Anthony Sanucci, Sr. (Cases Nos. 3–CA–152, 3–CB–37) and Straubinger Construction Co., Inc. (Cases Nos. 3–CA–172, 3–CB–45) are wholly unrelated to commerce, the assertion of jurisdiction over these Employers, who are not members of General Contracting Employers Association, herein called the Association, would not effectuate the policies of the Act.[3] However, for the reasons noted below, a different result is required with respect to the Association and those member-Employers involved in this proceeding.

The Association, of Buffalo, New York, is an organization comprised of 42 general contractors and 80 subcontractors engaged in the building-construction industry in Erie County, New York. Since 1936, the Association, in behalf of its employer-members, has negotiated and signed collective bargaining contracts with the Union covering laborers,[4] which is the classification of the employees involved in this proceeding. During the year 1948, 90 percent of all the industrial and commercial construction in Erie County was performed

[1] The substantive portions of the complaints allege that the Employers and general contracting Employers Association violated Section 8 (a) (3) of the Act by discriminatorily discharging certain employees because of their nonmembership in the Union; and that the Union violated Section 8 (b) (2) of the Act by demanding such discharges.

[2] The General Counsel's request for oral argument is hereby denied because the record and the briefs, in our opinion, adequately present the issues and positions of the parties.

[3] *Denver Building and Construction Trades Council* and *B. W. Fellers, Inc.*, 88 NLRB 212; *Denver Building and Construction Trades Council* and *William G. Churches, et al.*, 90 NLRB 378. We find no merit in the General Counsel's contention that the Trial Examiner was in error in dismissing these complaints on the ground that the Act delegates to the General Counsel the exclusive authority to determine in which unfair labor practice cases complaints should issue. See *Row Construction Company*, 88 NLRB 580; *Haleston Drug Strugs, Inc.*, 86 NLRB 1166.

Chairman Herzog would assert jurisdiction over Employer Straubinger because he is of the opinion that its individual operations have a substantial impact on commerce.

In accord with his dissent in the *Churches* case, *supra*, *Member Reynolds* would assert jurisdiction over Straubinger, but not over Employer Sanucci because the latter's operations fall within the *de minimis* doctrine.

[4] The record shows that in 1948, there was a labor dispute between the Union and the Association which affected all the employer-members and resulted in a complete work stoppage of all construction in Erie County.

by members of the Association. The volume of such construction amounted to approximately $20,000,000, of which amount approximately $2,000,000 represented purchases of materials received from outside the State of New York. A substantial number of construction jobs was performed by members of the Association for firms engaged in interstate commerce, within the meaning of the Act.

Consistent with our well-established policy in representation cases,[5] we find that in passing upon the jurisdictional issue herein, the Association and its members must be regarded as a single enterprise. That the totality of the operations, in volume and character, of all members of the Association has a substantial effect on interstate commerce is apparent. The fact that we might not assert jurisdiction as to each member of before the Board individually or that this proceeding does not directly involve all its members is not here material, because the alleged unfair labor practices are attributed to the Association itself and are the result of the application of a common labor policy by the Association on behalf of its members, including those involved herein.

We accordingly find, for the purposes of this proceeding, that the Association and Carpenter & Skaer, Inc., H. F. Stimm, Incorporated, and Fred Seitz, Inc., are engaged in commerce within the meaning of the Act and that it would effectuate the policies of the Act to assert jurisdiction in order to resolve the substantive issues raised by the complaints.

ORDER

IT IS HEREBY ORDERED that Cases Nos. 3–CA–86, 3–CB–21, 3–CB–26, 3–CA–150, and 3–CB–36, be, and they hereby are, remanded to the Trial Examiner for the preparation and issuance of an Intermediate Report, setting forth his findings of fact, conclusions of law, and recommendations with respect to the unfair labor practices alleged in the complaints.

IT IS FURTHER ORDERED that the complaints, with respect to Cases Nos. 3–CA–152, 3–CB–37, 3–CA–172, and 3–CB–45, be, and they hereby are dismissed.

ORDER

Charges having been duly filed in the above-captioned cases;

Complaints, notices of hearing, and an order consolidating cases having been issued on June 22, 1949, by the General Counsel of the National Labor Relations Board, by the Regional Director for the Third Region;

Answers having been filed by each of the respondents;

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[5] *Indianapolis Cleaners and Launderers Club*, 87 NLRB 472, reversing 85 NLRB 1198; *Wirts Distributing Co., et al.*, 82 NLRB 669; *Air Conditioning Company of Southern California, et al.*, 81 NLRB 946.

A hearing having been held in Buffalo, New York, on July 18, 19, and 20, 1949, before the undersigned Trial Examiner, and evidence having been received on all issues raised in the pleadings;

Motions having been made at the close of the hearing by each of the Respondents for dismissal of the complaints, and ruling upon said motions having been reserved;

Briefs having thereafter been received;

A summary of evidence adduced at the hearing as to the business of the employer respondents, and each of them, being as follows:

A. *The Association:* General Contracting Employers Association of Buffalo, New York, is a voluntary organization consisting of 42 general contractors, about 80 subcontractors and 40 material dealers. Its purposes are, according to its constitution:

> to maintain high professional standards in the fulfillment of contracts, to combat unfair practices in the industry, to encourage sound business methods and to deal collectively with labor.

According to the testimony of its executive vice-president, it has functioned according to its purposes since its founding in 1936. In short, it appears to be what is commonly termed a service organization, engaging in no actual construction work itself. As well as with other basic construction labor organizations in the industry, the Association negotiates and enters into written bargaining agreements with the Hod Carriers; such contracts covering each of the Association members. During 1948, members of the Association, according to reports submitted to the Association, reported doing a gross business approximating $20,000,000. All of the construction work was done within Erie County, New York. According to testimony of the said vice-president, general contractors perform about 45 percent of the total contracts, amounting to about $9,000,000; and subcontractors the remainder, amounting to about $11,000,000. According to the same witness, the general contractors purchase materials originating outside New York State valued at about 5 percent of their contract total, while about 15 percent of the subcontractors' total contract price is expended in the purchase of materials originating outside the State. Accordingly it would appear that the total value of out-of-state purchases would be 5 percent of $9,000,000, or $450,000, plus 15 percent of $11,000,000, or $1,650,000. That total, according to the Trial Examiner's calculation, is about $2,100,000. General Counsel, however, during the hearing, obtained an affirmative answer from the said vice-president to a leading question in which he arrived at a total of $4,000,000,—by adding 5 percent and 15 percent, and then, apparently, figuring 20 percent of $20,000,000.

According to the vice-president's testimony, he arrived at an estimated percentage of out-of-state purchases only by using, as one example, figures obtained from one member contractor, not involved in these proceedings. The estimate does not appear, from other evidence, to be reasonably accurate beyond doubt, since the two general contractor members, actually involved in these proceedings, produced figures at the hearing showing that while they did a total contract business in 1948 amounting to about $2,887,000, their material purchases originating outside New York amounted in value to only $96,000, or about 3½ percent of the total contract price.

B. *Carpenter & Skaer:* The total contract value of work performed and serviced by this employer in its fiscal year from April 1, 1948 to March 31, 1949, amounted to $1,087,272.73. Of this total the company performed work valued at $684,903.73, while sub-contractors performed the remainder. During this period Carpenter & Skaer purchased materials and supplies valued at about $175,000,

of which an estimated 20 or 25 percent, amounting in dollar volume from $35,000 to $43,000, originated outside New York. This employer is a member of the Association.

C. *Stimm:* During 1948 Stimm performed work and services on construction contracts valued at about $1,800,000, all being performed in New York. During the same period Stimm purchased materials valued at about $386,000, of which approximately 14 percent, or $53,000 worth, came from outside the State. Stimm is a member of the Association.

D. *Straubinger:* This employer is not a member of the Association. During 1948 Straubinger's total volume of business amounted to about $676,066.80, according to a document submitted in evidence by General Counsel and attested as correct by the company's president. According to the same witness, materials valued at about $80,000, or about 12 percent of total materials purchased valued at $534,202.92, originated outside New York.

E. *Fred Seitz, Inc.:* Seitz is a plastering contractor, and is a sub-contracting member of the Association. During 1948 it purchased materials valued at about $55,000. Of this total, materials valued at about $10,000 had their origin outside New York.

F. *Anthony Sanucci, Sr.:* Sanucci is a masonry contractor. His entire volume of business in 1948 amounted to $15,523.26, and his purchases of materials were valued at $7,538.67. Purchased materials valued at $1,848.14 had their origin outside the State of New York. . According to Sanucci's testimony, most of his work consists of "small jobs" or repairing.

Now, THEREFORE, the said Trial Examiner, being fully advised in the premises, having duly considered the entire record in the case, particularly as to the commerce allegations and evidence, is of the opinion that the operations of the respondent employers, and each of them, are essentially local in character. The Trial Examiner is of the further opinion that the organization of local contractors into an Association which represents them in collective bargaining does not transform the nature or extent of the business performed by its members as individuals. In view of present Board policy, set out in *Indianapolis Cleaners & Launderers Club*, and in other cases,[1] and although it does not appear that the operations of the respondent employers in the above-captioned cases are wholly unrelated to commerce, the Trial Examiner is of the opinion that assertion of jurisdiction in these cases, or any of them, would not effectuate the policies of the National Labor Relations Act;

Said motions urging dismissal upon jurisdictional grounds are hereby granted; and it is hereby

ORDERED, that said complaints, and each of them, be dismissed in their entirety.

Any party may obtain a review of the foregoing order, pursuant to Sec. 203.27, Rules and Regulations, Series 5, as amended August 18, 1948, by filing a request therefor with the Board, stating the grounds for review, and immediately on such filing serving 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.

CHARLES W. WHITTEMORE,
Trial Examiner.

Dated: November 1, 1949.

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[1] *E. T. Gresham Company, Inc.*, 85 NLRB 891; *Building and Construction Trades Council of Pittsburgh, Pa., et al*, 85 NLRB 241; *Indianapolis Cleaners & Launderers Club*, 85 NLRB 1198.