

In the Matter of KEAMCO, INC. (ROYAL THEATRE) and HAROLD P. DOUGLAS, JR.

In the Matter of PHILADELPHIA MOVING PICTURE MACHINE OPERATORS UNION, LOCAL #307-A, AFFILIATED WITH INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL and HAROLD P. DOUGLAS, JR.

Cases Nos. 4-CA-222 and 4-CB-36.—Decided June 30, 1950

DECISION AND ORDER

On March 20, 1950, Trial Examiner Reeves R. Hilton issued his Order Dismissing Complaint in the above-entitled proceeding, finding that it would not effectuate the policies of the Act to assert jurisdiction in this proceeding, and dismissing the consolidated complaint, as set forth in the copy of the Order Dismissing Complaint attached hereto. Thereafter, the General Counsel filed a request for review, pursuant to Section 203.27 of the Board's Rules and Regulations, and supporting brief.¹

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. Except as noted, the rulings are hereby affirmed.² The Board has considered the Order Dismiss-

¹ As the request for review was timely filed, the Respondent Union's motion to dismiss, which asserts that said request was not timely, is hereby denied. See Section 203.86 of the Board's Rules and Regulations.

² On the ground that it was not within the issues as framed by the complaint, the Trial Examiner excluded certain evidence offered by the General Counsel for the purpose of establishing the relationship of certain of the stockholders, officers, and directors of the Respondent Employer to certain other theatres, located in Pennsylvania and New Jersey. The General Counsel sought, by means of such evidence, to establish that the Respondent Employer operated the Royal Theatre as part of an interstate chain of motion picture theatres. The exclusion of the proffered evidence was error. The complaint did not specifically allege that the Respondent Employer operated the Royal Theatre as part of an interstate chain. However, the broad jurisdictional allegations of the complaint, to the effect that the activities of the Respondent Employer affect commerce, made relevant and material any evidence relating to the issue of jurisdiction. Although it would have been better practice, had the General Counsel amended the complaint, as suggested by the Trial Examiner, to allege specifically that the Royal Theatre was operated as part of an interstate chain, once the jurisdiction issue has been raised, any evidence relevant to that issue is admissible. Accordingly, the Trial Examiner's rulings excluding such evidence are hereby reversed.

We have, therefore, considered the General Counsel's offer of proof with respect to such evidence. Assuming, for the purposes of this proceeding, the General Counsel's ability to

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sing Complaint, the General Counsel's request for review and supporting brief, and the entire record in the case.³ We find that the Respondent Employer's operations at the Royal Theatre, which are fully described in the Trial Examiner's Order, affect commerce within the meaning of the Act. However, because such operations are essentially local in character, we find that it would not effectuate the policies of the Act to assert jurisdiction in this proceeding. Accordingly, we affirm the Trial Examiner's dismissal of the complaint and deny the General Counsel's request that his ruling be reversed.

ORDER

IT IS HEREBY ORDERED that the complaint herein be, and it hereby is, dismissed.

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

ORDER DISMISSING COMPLAINT

Upon charges duly filed, the General Counsel issued his consolidated complaint dated November 28, 1949, in the above-entitled cases. The Respondent Keamco, Inc., and the Respondent Philadelphia Moving Picture Machine Operators Union, Local #307-A, affiliated with International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL¹ (herein called Local 307-A), filed separate answers to the complaint denying the jurisdiction of the National Labor Relations Board and the commission of unfair labor practices.

A hearing was held at Philadelphia, Pennsylvania, before the undersigned Trial Examiner, on February 7 to 9, 1949. All parties were represented by counsel, participated in the hearing, and were afforded full opportunity to examine and cross-examine witnesses, to introduce relevant evidence bearing upon the issues, to present oral argument, and to file briefs. Counsel orally argued the matter before the Trial Examiner and briefs have been received from the parties.

At the close of the hearing, the Respondents moved to dismiss the complaint on jurisdictional grounds. The Trial Examiner reserved ruling on this motion and the matter was taken under advisement. Now upon the basis of the plead-

prove the facts contained in the offer, such facts would establish, at most, that the Wax family controlled and operated six motion picture theatres in Philadelphia, Pennsylvania, that two members of that family also operate one motion picture theatre in Atlantic City, New Jersey, and that all such theatres were operated as a joint enterprise. These facts would not, in our opinion, establish that the Royal Theatre operates as an integral part of an interstate chain of the type which we have held warrants asserting jurisdiction over what would otherwise be regarded as a purely local enterprise. Cf. *Balaban & Kutz (Princess Theatre)*, 87 NLRB 1071. We find, therefore, that the Trial Examiner's error was not prejudicial. Accordingly, the General Counsel's motion, that this proceeding be remanded for the purpose of receiving such evidence, is hereby denied.

³ As the record and the General Counsel's request for review and supporting brief, in our opinion adequately present the issues and the positions of the parties, the Respondent Union's request for oral argument is hereby denied.

¹ As amended at the hearing.

ings, the evidence, and the entire record in the proceedings, and upon consideration of the briefs submitted, the motion of Respondents is granted for the reasons set forth below.

The complaint alleges, and it is undisputed, that Keamco, a Pennsylvania corporation owns² and operates the Royal Theatre in Philadelphia, Pennsylvania, where it is engaged in the business of exhibiting motion pictures to the public. The Royal is the type of theatre commonly known as a "neighborhood" house and has a capacity of 980 persons. The complaint further alleges that Keamco "in the course and conduct of its operation of its Royal Theatre . . ." is engaged in commerce as defined in the Act. During the course of the hearing, the General Counsel sought to establish that the Royal is operated as part of a chain of four or five local theatres, and that certain officers and stockholders in Keamco "leased" or had an "interest" in the Allan Theatre in Atlantic City, New Jersey. In substance, the General Counsel established that Keamco and another corporation, Stamco, Inc., operating the Standard Theatre, located in Philadelphia, have practically the same officers and stockholders and that Morris Wax, president of the corporations, executed separate collective bargaining agreements with Local 307-A. Moe Wax, vice president of Keamco, a witness for the General Counsel, denied that the Royal was operated as a part of any chain system and denied that he or any other officer or stockholder of Keamco had "leased" or had any "interest" in the Allan Theatre. Thereafter, the Trial Examiner refused to permit the introduction of evidence with respect to any interstate chain operation on the part to Keamco, since such evidence was beyond the issues as framed by the complaint, as well as constituting a different theory from that upon which the complaint is based. While the General Counsel conceded that the jurisdictional allegations in the complaint are limited to the business operations of Keamco at the Royal,³ he did not request leave to amend his complaint to allege that Keamco is engaged in an interstate chain operation. As appears below, the fact that the Royal may have been operated as part of a local or intrastate chain is of no consequence.

In Philadelphia motion pictures are distributed to exhibitors through the medium of local film exchanges established by both the major and minor picture producers or distributors, as well as State right or apparently independent ex-

² Keamco also owns the Lincoln Theatre in Philadelphia but has always leased the same to other operators; the last lease expired in October 1949.

³ In his brief filed with the Trial Examiner the General Counsel states (p. 17) that the jurisdictional allegations in the complaint were "broadly and generally drawn without reference to the actual or specific organization of Respondent Employer's corporate structure; its systems of executive management and control; or its relations by affiliation, common ownership and control, to other enterprises. It was supposed at the hearing, evidence on these subjects would be admitted for the purpose of showing the full extent of the theatre holdings and operations of the Wax family which entirely owns Respondent Employer." At the hearing, the General Counsel admitted (Tr. pp. 199-200) that when the complaint was issued he "was not in possession of facts which indicated what relationship existed, if any, between the respondent, Keamco, and other theatres." The record further discloses that the original charge against the Respondent Keamco was filed on April 11, 1949, and the complaint issued on November 28, 1949; the record fails to disclose what steps the General Counsel pursued to secure these facts during the above period. In any event, it is immaterial what reasons or motives may have prompted the General Counsel to allege the jurisdictional facts upon the theory and in the language chosen; it is sufficient to state that he has done so. Further, such reasons or motives do not alter or affect the elementary principle that the purpose of the complaint is to frame and apprise the Respondent of the issues to be litigated (*Cathey Lumber Co.*, 86 NLRB 157).

changes.⁴ These exchanges maintain positive prints of pictures, which are processed or printed from the master negatives in laboratories located in the States of California, New York, and New Jersey and are shipped to the exchanges for release. The exchanges, through their salesmen or representatives, solicit license or rental agreements with the exhibitors for the exhibition of their pictures, which agreements are subject to approval by the home office of the respective exchanges, all of which are located in New York City.⁵ Generally, the exhibitor may "book" the picture, i. e., the date of showing which is usually 2 weeks in advance of the actual showing, prior to approval by the home office. When the picture is ready for exhibition the exchange delivers the print to the theatre and upon completion of its run it is returned to the exchange. Feature pictures⁶ are ordinarily first shown at downtown or "first-run" theatres and from about 2 to 4 weeks after the completion of this showing they are exhibited at "key neighborhood" theatres.⁷ From 1 to 3 weeks subsequent to this showing, feature pictures are exhibited at "third-run" theatres and the system continued successively until the pictures may be shown at sixth or seventh run theatres.⁸ In Philadelphia, a "top" feature picture, during the entire period of its release, may be shown at 125 different theatres. The Royal is known as a "third-run" theatre.

In accordance with the above-mentioned procedure, Keamco rents its pictures⁹ from exchanges in Philadelphia including those of the major film producers, namely, RKO, Columbia, Universal, United Artists, Warner Bros., Paramount, and Twentieth-Century Fox. During the year 1949, Keamco exhibited approximately 200 feature pictures and its license fees for all pictures shown amounted to approximately \$40,000. During the same year Keamco received about \$100,000 gross (after deduction of taxes) from the sale of admissions and about \$10,000 from candy and soft drink concessions. In the same period the expenditures of Keamco amounted to approximately \$50,000, consisting principally of wages, local advertising, and tickets which are purchased and printed locally. All supplies and equipment, including 2 motion picture projectors and subsidiary projection booth equipment are purchased and obtained locally. The funds of Keamco are deposited in a local bank and all disbursements for wages, withholding taxes, Federal, State, and city taxes, and other expenses are made from these funds. Keamco is a member of the Allied Independent Theatre Owners of Eastern Pennsylvania, a typical trade association, but the association exercises

⁴ There are approximately 17 exchanges; the major companies operate 8 and the minor companies 5. The remainder are State right exchanges which buy or lease exhibition rights from producers or distributors and have no "hook-up" with other exchanges under the general management of the same company.

⁵ The exchange mails the agreement in triplicate to its New York office for approval. When approved, the signature of the appropriate officer is stamped or perforated upon the agreement and two copies are returned to the exchange; one is retained by the exchange and one is given to the exhibitor. Until such approval, the agreement is merely an "application" to exhibit the picture submitted by the exhibitor.

⁶ About 250 feature pictures are produced each year. Newsreels, short subjects, average westerns, etc., are not considered as feature pictures.

⁷ In Philadelphia, there are approximately 10 first-run theatres and between 8 and 18 key neighborhood theatres. The latter depend upon the number of prints made available by the particular exchange for simultaneous showing of the picture by these theatres.

⁸ There are approximately 180 theatres in Philadelphia which exhibit pictures after the "key neighborhood" theatres.

⁹ Feature pictures are leased individually whereas newsreels, serials, and shorts may be and are leased in series covering a stated period of time.

no authority or control over the management or labor policies of Keamco. In its normal operations Keamco employs about 24 persons including 2 regular, 2 assistant, and 1 relief projectionists. Its weekly payroll amounts to about \$8,000. Keamco has recognized and executed collective bargaining agreements with Local 307-A covering the projectionists employed at the Royal, the present agreement expiring August 31, 1950.

The Respondents assert that the exhibition of motion pictures at the Royal is purely a local affair, therefore Keamco is not subject to the jurisdiction of the Board and, in any event, the assertion of jurisdiction by the Board in this case would not effectuate the policies of the Act.

I am of the opinion that Keamco in the operation of its theatre is plainly engaged in a business affecting commerce as that term is defined in the Act. It is true that the mere exhibition of pictures at the Royal is essentially a local enterprise but it has long since been established that an employer may be subject to the jurisdiction of the Act although not himself engaged in commerce.¹⁰ As appears above, Keamco rents pictures from the Philadelphia exchanges of the major producers or distributors under license agreements which must be approved by the New York office of the particular exchange. Under this arrangement the exchanges, which receive films from places outside the State of Pennsylvania, deliver the same to Keamco for showing and upon completion thereof pick up the prints for exhibition at other theatres. This procedure is continuous and during 1949 was repeated on about 200 occasions with respect to feature pictures alone. Under these circumstances it can scarcely be denied that a labor dispute involving the employees at the Royal Theatre would have the necessary intent or effect of burdening or obstructing interstate commerce.

The Respondents urge that the business operations of Keamco are very small and unimportant when considered in relationship to the Nation-wide motion picture theatre industry and, therefore, jurisdiction should not be exercised in this matter. The record¹¹ discloses, that during 1949, there were throughout the United States, in round figures, 20,000 motion picture theatres, with a seating capacity of 12,000,000 persons, which employed 172,000 employees; in 1948, the weekly payroll of these theatres amounted to \$175,000,000, they also paid film license fees in the aggregate sum of \$540,000,000, and their total income from the sale of admissions amounted to \$1,545,000,000. Certainly, these figures are impressive, but neither the volume of business nor the relative position of the particular employer in respect to the entire industry is controlling insofar as the power of the Board to assert jurisdiction is concerned, provided such volume does not fall within the *de minimus* doctrine. Obviously, the volume of business transacted by Keamco does not fall within that doctrine (*Fainblatt* case, *supra*; *N. L. R. B. v. Suburban Lumber Co.*, 121 F. 2d 829 (C. A. 3)).

I am not persuaded by the argument that the operations of Keamco, or those of any local theatre, are insignificant or unimportant in comparison to the entire industry. On the contrary, it appears to me that the vast motion picture production and distribution system¹² is dependent upon local theatres to exhibit their pictures and, accordingly, the Royal and like theatres may be looked upon as a part or phase of that system. The Supreme Court in *U. S. v. Crescent Amusement Co.*, 323 U. S. 173, held that injunctive relief, under the Sherman

¹⁰ *N. L. R. B. v. Fainblatt*, 306 U. S. 601, 604.

¹¹ The credited testimony of Herbert Miller, editor of "Exhibitor," a journal published and distributed by the National Motion Picture Trade Association.

¹² See *Columbia Pictures Corporation, et al.*, 61 NLRB 1030, and 73 NLRB 486.

Anti-Trust Act (26 Stat. 209, 15 U. S. C. Sections 1-2), is proper to restrain certain exhibitors and distributors from continuing in effect or resuming license agreements whereby the exhibitors secured a monopoly in the exhibition of pictures in a particular area and thereby eliminated from competition the independent local operator. In passing upon the motion picture distribution system, the Court stated that although the showing of pictures is a "local affair" the regular exchange of films in interstate commerce is adequate to bring the exhibitors within reach of the term commerce as defined in the Act¹³ (pp. 153-184). Accord: *Bigelow v. RKO Theatres*, 327 U. S. 251.

Be that as it may, the Board in recent decisions has refused for policy reasons to assert jurisdiction in cases where the employer is engaged in an essentially local business even though the operations of the employer in the conduct of such business may affect interstate commerce.¹⁴ On the other hand, the Board has consistently held that an essentially local business loses its local character when it is part of an intergrated interstate operation and, accordingly, the Board has asserted jurisdiction over such enterprises.¹⁵ Thus, in *Balaban & Katz (Princess Theatre)*, 87 NLRB 1071, the Board asserted jurisdiction over a local motion picture theatre, a segment of an interstate chain of 120 theatres directed and controlled from the home office of the employer, since it was "operated as an intergral part of the Employer's Multi-State business." In its decision the Board pointed out the employer rented films from the local exchanges of the distributors at an annual rental exceeding \$25,000, but the relationship of this phase of the employer's operations in respect to commerce was not discussed, nor was it necessary to do so in view of the employer's interstate chain operations. Since the Respondent Keamco is not engaged in any interstate chain business, I am of the opinion its operations concerning the Royal Theatre are essentially local in nature and, while the operations are not unrelated to commerce, I believe that to assert jurisdiction in this case would not effectuate the policies of the Act. (Cf. *Olympia Stadium Corporation*, 85 NLRB 389.)

For the reasons stated, the motion to dismiss the complaint upon jurisdictional grounds is hereby granted; and it is hereby

ORDERED that said complaint be dismissed in its entirety.

Any party may obtain a review of the foregoing order, pursuant to Section 203.27 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 case shall be closed.

REEVES R. HILTON,
Trial Examiner.

Dated March 20, 1950.

¹³ The Act provides that, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ." (15 U. S. C. Section 1.)

¹⁴ A-1 *Photo Service*, 83 NLRB 564; *Haleston Drug Stores, Inc.*, 86 NLRB 1166; *The White Sulphur Springs Company*, 85 NLRB 1487; *George W. Looby*, 85 NLRB 412; *Ray-Lyon Co., Inc.*, 83 NLRB 487; *Tom Thumb Stores, Inc.*, 87 NLRB 1062; *Squire's, Inc.*, 88 NLRB 8. In *Petredis and Fryer*, 85 NLRB 241, the Board refused to assert jurisdiction over contractors engaged in construction of drive-in theatre although substantial amounts of materials purchased by local suppliers originated out of State.

¹⁵ *Childs Company*, 88 NLRB 720, and cases cited.