

In the Matter of BENSON-GOSS FUELS, INC., SUCCESSOR TO BENSON COAL COMPANY AND GOSS FUELS, INC. and ERNEST W. HUGHES, GEORGE McCLAY, AND ERLAND C. TESCHEK

Case No. 1-CA-343.—Decided July 28, 1950

DECISION AND ORDER

On May 5, 1950, Trial Examiner Hamilton Gardner issued his Order Dismissing Complaint in the above-entitled proceeding, finding that the operations of the Respondent, while not unrelated to commerce, are essentially local in character, that the assertion of jurisdiction in this case would not effectuate the policies of the Act, and dismissing the 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 Rules and Regulations, together with a supporting brief. The Respondent filed a brief in support of the Order Dismissing Complaint.

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 Order Dismissing Complaint, the General Counsel's request for review, the briefs, and the entire record in the case,² and we hereby affirm the Trial Examiner's dismissal of the complaint and deny the General Counsel's request that his ruling be reversed.

While we find that the Respondent's operations affect commerce within the meaning of the Act, we agree with the Trial Examiner that they are essentially local in character and that it will not effectuate the policies of the Act to assert jurisdiction in this case. The Board has asserted jurisdiction over retail coal and fuel oil dealers on the basis of a substantial volume of out-of-State purchases coupled with a *substantial* volume of sales to enterprises that are engaged in inter-

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

² The Respondent's motion for oral argument is denied as we find that the record and briefs adequately present the positions of the parties.

state commerce.³ In the present case, however, only \$11,051 was received by the Respondent from sales to persons or concerns engaged in interstate commerce. Under these circumstances, there is not, in our opinion, sufficient warrant for asserting jurisdiction over the Respondent's operations.⁴ Accordingly, we shall dismiss the complaint in its entirety.

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 issued herein against the Respondent, Benson-Goss Fuels, Inc., Melrose, Massachusetts, be, and it hereby is, dismissed.

ORDER

Leo J. Halloran, Esq., Boston, Mass., for the General Counsel.

Charles O. Williams, Esq., Dedham, Mass., *Edward P. Barry, Esq.*, Wellesley Hills, Mass., and *Robert E. Freer, Esq.*, Washington, D. C., for the Respondent.

Mr. Martin J. Moran, Boston, Mass., for the Union.

Charges having been filed in the above-captioned case, a complaint and a notice of hearing having been issued by the General Counsel of the National Labor Relations Board, by its Regional Director for the First Region (Boston, Massachusetts), an answer having been filed by Respondent, a hearing having been held in Boston, Massachusetts, from November 29, 1949, through December 14, 1949, before the undersigned Trial Examiner, duly designated by the Chief Trial Examiner, evidence having been received on the issues, a motion having been made by the Respondent to dismiss the complaint on which ruling was reserved, and the evidence adduced at the hearing showing the nature of the Respondent's business to be as follows:

Benson-Goss Fuels, Inc., hereinafter called the Company, is a corporation of the Commonwealth of Massachusetts, with its principal place of business at Melrose, a city of 27,000 inhabitants, near Boston. It is a corporate entity resulting from the merger, on July 20, 1949, of 2 Massachusetts predecessor corporations, Benson Coal Company and Goss Fuels, Inc., Frank E. Keniston was president and manager of Benson and treasurer of Goss and owned all but 2 shares of stock in each company. Presently he owns 850 of the 1,000 shares of the stock of Benson-Goss Fuels, Inc.

The new company operates two yards at Melrose. Primarily it engages in the retail business of selling coal, coke, fuel oil, oil burners and accessories, services on oil burners, and small amounts of fertilizers, wood for fuel, and building materials such as cement, gypsum, and plaster.

During the fiscal year of 1948-49, which ended for Benson on March 31, 1949, and for Goss on May 31, 1949, total purchases of materials were made in the sum

³ *Nassau Mutual Fuel Co.*, 90 NLRB 1233. Cf. *Indianapolis Cleaners and Launderer's Club*, 87 NLRB 472. See also *Modern Heat & Fuel Company*, 89 NLRB 1345, wherein not only were a substantial portion of the employer's sales made to manufacturers and industrial concerns, but the employer also had some out-of-State sales.

⁴ *Backart Coal Co.*, 86 NLRB 537; *Penn Coal Company, Inc.*, 80 NLRB 251. Cf. *Tunnel Mill Mining Company*, 90 NLRB 787, and *Hackathorn & Myers*, 90 NLRB 785, wherein the employers, unlike the Respondent in the instant case, were engaged in the mining of coal.

of \$643,421.45. With very few exceptions, which will be noted later, all these materials were bought from local wholesale dealers, jobbers, and brokers in and near Boston. Coal and coke in the amount of \$90,128.66 were delivered directly from the railroad to the Benson-Goss Fuels, Inc.'s sidings. The coal came entirely from outside Massachusetts, but the coke (a small amount in comparison with the coal) was made within the Commonwealth. Fuel oil in value of \$415,253.35 was produced outside of Massachusetts, although purchased locally from the Esso Standard Company at Everett, near Melrose. Of other minor purchases the fertilizers were manufactured in Wisconsin; the fire wood grown in Maine; the cement produced in Maine; the oil furnaces, burners, and accessories fabricated in States other than Massachusetts. Of the last mentioned 3 items, the Company had purchased 1 or 2 small part carload lots directly from the manufacturer instead of from local dealers, namely, \$810.98 from New Jersey, \$393.43 from Connecticut, and \$4,320 from Rhode Island, of a total of \$32,252.03.

Sales for the fiscal period mentioned reached \$894,321.96. The present company employs from 30 to 35 people.

Benson-Goss Fuels, Inc., made no sales or deliveries of its goods or services whatsoever to any purchasers outside of Massachusetts. Almost all its business was carried on with householders. Thus 95 percent of the coal, 100 percent of the coke and 95 percent of the fuel oil were sold directly to private homes and apartments for heating purposes alone. Similarly 95 percent of the oil servicing performed was in households. The building supplies sold represented 6.2 percent of the entire business and of this one-half went to households. Of total sales over 88 percent were made directly to householders. None of the was engaged in interstate commerce.

The remaining 12 percent of purchases were of various types, but in no case did the coal, fuel oil, or other minor materials actually enter into the finished product of any buyer. They were used solely to heat the purchaser's building, factory, or other premises.

Some of these were types of organizations not engaged in business at all, e. g., the Y. M. C. A., the Veterans of Foreign Wars, several churches, the American Red Cross, a golf club, and some departments of Melrose city.

Other buyers included a pie manufacturer, a cleaning and dyeing establishment, a grain and livestock feed store, a window glazing business, a hotel, a plumbing and heating concern, a highway construction contractor, a residence building contractor, a radio equipment dealer, some apartment houses, and a seller of oil-heating equipment for homes. None of these concerns made any sales outside of Massachusetts and all used the fuel purchased only for heating purposes.

The company also sold fuel to a local newspaper and two savings banks. Theoretically, through the circulation of the first and through the possession of some stocks and bonds by the others, these might be considered as being engaged in interstate commerce. But the fuel they bought was used exclusively to heat their premises.

A fourth class of purchasers consisted of several local manufacturers who did sell varying proportions of their products outside Massachusetts. These included the production of pies, candy, chemicals for use in the textile business, industrial testing apparatus, and similar concerns. But in no instance did the fuel sold by Benson-Goss Fuels, Inc., become a component part of their finished articles; it merely served to heat their plants. From the figures presented this class accounts for considerably less than 2 percent of total purchases from the company.

Still a fifth category of buyers were local automobile retail dealers, handling Ford, De Soto, Plymouth, Lincoln, Mercury, and Chevrolet automobiles, accessories and parts. These cars were produced in States other than Massachusetts, but the record is silent as to whether these dealers sold any of them otherwise than locally. In any event they used Benson-Goss fuel only for heating purposes.

Thus the situation existing in this case is that practically all the materials and goods purchased by the Company were produced outside of Massachusetts and were received either indirectly or directly. As to inflow, therefore, interstate commerce is indicated. On the sales side—outflow—it is clear that the volume may be at least as great as the Board has sometimes utilized previously as a basis for exercising jurisdiction. But the facts still remain that almost 90 percent of fuels sold by the Company were for household heating use and as to the balance only a small part of the purchasers engage in interstate commerce and as to those who did, the purchases from the Company were utilized for heating purposes only and did not enter into any end products.

The Trial Examiner has been able to find only two cases in which the Board has passed on the question of exercising jurisdiction over retail coal yards. Both were representation cases and in both instances the Board declined jurisdiction.¹

Considering the entire record in the case, particularly the evidence respecting commerce and the contentions of the parties with respect thereto, the Trial Examiner is of the opinion that while the operations of the Respondent are fairly substantial, and not wholly unrelated to interstate commerce, they are nevertheless essentially local in character, constitute an enterprise of a nature over which the National Labor Relations Board has not heretofore asserted jurisdiction, and that it will not effectuate the policies of the National Labor Relations Act, as amended, to assert jurisdiction in this case at this time.

The motion urging dismissal on jurisdictional grounds is hereby granted, and it is hereby

ORDERED that the complaint be dismissed.

Any party may obtain a review of the foregoing order, pursuant to Section 203.27 of the Rules and Regulations of the Board, Series 5, as amended August 18, 1948, by filing a request therefor with the National Labor Relations Board, Washington 25, D. C., stating the grounds for review, and immediately on such filing serving a copy thereof on the Regional Director of the First Region, Boston, Massachusetts, and on the other parties. Unless such request for review is filed within ten (10) days from the date of the order of dismissal, the case shall be closed.

Dated at Washington, D. C., this 5th day of May 1950.

HAMILTON GARDNER,
Trial Examiner.

¹ Penn Coal Co., 80 NLRB 251; Backart Coal Co., 86 NLRB 537.