

SHAW BENDERLY AND BEN BENDERLY, d/b/a AUBURN BUS COMPANY *and* AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1269, AFL. Case No. 3-CA-664. January 21, 1954

DECISION AND ORDER

On October 13, 1953, Trial Examiner Ralph Winkler issued his Intermediate Report, a copy of which is attached hereto, finding that the Respondent is not engaged in commerce or in activities affecting commerce within the meaning of the Act, and recommending that the complaint in this matter be dismissed. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

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 Intermediate Report, the General Counsel's exceptions and brief, and the entire record in the case and hereby adopts the findings and conclusions contained in the Intermediate Report.

[The Board dismissed the complaint.]

Member Murdock, dissenting:

I disagree with the refusal to assert jurisdiction in this case following category 2 of the Board's jurisdictional plan as announced originally in W. C. King d/b/a Local Transit Lines, 91 NLRB 623. The Board there said:

Our experience has shown that public utilities, including public transit systems of the type here involved, have such an important impact on commerce as to warrant our taking jurisdiction over all cases involving such enterprises, where they are engaged in commerce or in operations affecting commerce, subject only to the rule of de minimis. Accordingly, we will assert jurisdiction in this case and will hereafter assert jurisdiction in all other cases involving public utilities and public transit systems of the type here involved, subject only to the foregoing limitation.

The Respondent in the instant case operates the only public bus transportation in Auburn, New York. It serves employees of enterprises engaged in interstate commerce over whom the Board asserts jurisdiction and runs special rush-hour buses to accommodate workers in these plants. These include the American Locomotive Co., Firth Carpet Co., the General Electric Co., etc. The case clearly falls within the jurisdictional plan as announced in the W. C. King case--indeed Respondent has more employees and operates more buses than the employer in that case.

My majority colleagues have simply rubber-stamped the Trial Examiner's Intermediate Report which dismisses the case on the ground that it "falls within the Board's holding in the San Jose¹ case." In the San Jose case, as the Trial Examiner points out, the Board "without referring to its established jurisdictional policy" dismissed a representation case involving the public transit system of San Jose, California.

Although both the instant case and the San Jose case are departures from and inconsistent with the Board's jurisdictional plan as laid down in the W. C. King case, neither decision overrules that case, rationalizes the result, or indicates what the substitute policy is for the assertion of jurisdiction over public transit systems. I further note that in the San Jose case the evidence indicated that the employer was a part of a multistate transit system which would have warranted the assertion of jurisdiction under another section of the plan--as an integral part of a multistate enterprise.² In other words, we are here confronted with the practice I decried in my dissent in Taichert, Inc.,³ of approaching jurisdictional issues on an ad hoc basic without regard to the Board's jurisdictional plan, casting doubt on established doctrines, and leaving confusion as to what the Board's current jurisdictional policy is.

I also note a further ground upon which jurisdiction could be asserted here--the section of the plan which provides for asserting jurisdiction over enterprises which substantially affect the national defense. One of the plants served by this transit system is an American Locomotive Co. plant which manufactures tanks for the United States Army. I would assume that an industrial dispute resulting in a stoppage of Respondent's buses would interfere with employees of that plant getting to work and thus adversely affect the production of army tanks. In my Taichert, Inc., dissent I have stated my views fully as to the importance of a liberal approach in asserting jurisdiction over enterprises which substantially affect the national defense and refer to that opinion.

Accordingly, for all the reasons above, I disagree with the majority's departure from precedent and would assert jurisdiction over the Respondent.

¹ San Jose City Lines, Inc., 106 NLRB 1167.

² The Borden Co., 91 NLRB 628.

³ 107 NLRB 779.

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

Upon charges filed by Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1269, AFL, a labor organization herein called the Union, the General Counsel for the National Relations Board issued a complaint on July 7,

1953, against Shaw Benderly and Ben Benderly, d/b/a Auburn Bus Company, herein jointly called the Respondent, alleging that the Respondent had engaged in specified conduct violating Section 8 (a) (1), (3), and (5) and Section 2 (6) and (7) of the Labor Management Relations Act, 1947, 61 Stat. 136, herein called the Act. Copies of the complaint and charges were served upon the Respondent, and the Respondent in turn filed an answer denying the commission of the unfair labor practices alleged.

Pursuant to notice, a hearing was held in Auburn, New York, on September 22, 1953, before the undersigned Trial Examiner. The General Counsel and the Respondent were represented by counsel and all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The parties were given opportunity to present oral argument before the Trial Examiner and also to file briefs and proposed findings of fact and conclusions of law. The Respondent has moved to dismiss the complaint on the merits, which motion I need not decide in view of the recommended dismissal of the case on other grounds.

THE BUSINESS OF THE RESPONDENT

Respondent is a copartnership which owns and operates the only public bus system in Auburn, New York, a town having an approximate population of 37,000. Respondent has 35 employees and 18 buses. While some of Respondent's routes pass the terminals of interstate passenger carriers (rail and bus), Respondent has no transfer or schedule arrangement with these interstate services. There are some interstate industrial concerns¹ located in Auburn, one of which manufactures army tanks, and Respondent runs special buses to accommodate employees working in these plants.

Respondent's gross income in 1952 was approximately \$260,000, and its yearly purchase of supplies and equipment is approximately \$45,000, of which amount approximately \$3,000 represents direct out-of-State purchases. Respondent obtained its motor coaches from out of the State at an approximate cost of \$180,000 when it entered the transit business in January 1950.

The partnership does not own or operate any other transit lines, except that 1 of the Respondent partners does own a bus line in a New York State township of approximately 1,000 inhabitants. The partnership has an application pending before the New York State Public Service Commission for the intrastate bus franchise between Auburn and Syracuse, New York.

In W. C. King d/b/a Local Transit Lines, 91 NLRB 623, the Board declared, in connection with formulating general jurisdictional standards, that it would assert jurisdiction over all public transit systems within the Board's legal competency, "subject only to the rule of de minimis." Under this test the present action might be entertained. Recently, however, in San Jose City Lines, Inc., 106 NLRB 1167, the Board dismissed a representation petition on jurisdictional grounds but without referring to its established jurisdictional policy. Except to indicate that the San Jose City Lines, Inc., is a subsidiary of an enterprise incorporated and operating in another State, the Board's decision in that case discloses no other underlying facts pertaining to the jurisdictional question. I would presume, however, that in a city of San Jose's location and size--approximately 95,000 inhabitants, according to the 1950 census--the public transit lines, as in the case of Respondent Auburn Bus Company, also serve employees of enterprises engaged in interstate commerce and operate routes in the vicinity of interstate carrier terminals.

I find that the instant case falls within the Board's holding in the San Jose case and that, in the language of that case, Shaw Benderly and Ben Benderly, d/b/a Auburn Bus Company, Auburn, New York, are "not engaged in commerce or in activities affecting commerce, within the meaning of the Act." I recommend, accordingly, that the complaint in this matter be dismissed.

¹For example: American Locomotive Co., General Electric Co., and U. S. Hoffman Machinery Corp.

CHECKER TAXI COMPANY *and* NEW ENGLAND TAXI CAB
DRIVERS UNION, LOCAL 1, Petitioner. Case No. 1-RC-
3374. January 21, 1954

DECISION AND ORDER

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Sidney A.