

will not receive the protections and restraints of the Act.²³ In the face of all this, I cannot, as does the majority, decline to assert jurisdiction. To do so, in the words of the court, quoted above, is to "allow thousands of retailers of new automobiles to engage in unfair labor practices" which, unchecked, can "bring to a complete standstill the interstate transactions of one of the Nation's greatest industries."

²³ See the dissenting opinion in *Hogue and Knott Supermarkets, supra*, as to the difficulty of any of these franchised dealers, among others, meeting the extreme new standards now required for local retail establishments whether or not they are franchised dealers.

J. R. KNOTT AND HUGH H. HOGUE D/B/A HOGUE AND KNOTT SUPERMARKETS and RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1529, AFL, PETITIONER. *Case No. 32-RC-758. October 26, 1954*

Decision and Order

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before John E. Cienki, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer,¹ a partnership, operates two supermarkets in Memphis, Tennessee, under the name of Hogue and Knott Supermarkets. The Petitioner seeks to represent the employees of both stores in a single unit. The Employer moves to dismiss on the grounds that it would not effectuate the policies of the Act for the Board to assert jurisdiction in this case. For the reasons set forth below, we grant the Employer's motion.

All the Employer's sales are made locally at its stores on a cash-and-carry basis. The Employer's total annual purchases are valued at approximately \$2,360,000, of which about \$224,000 represents shipments to the Employer directly from out-of-State, and not more than \$1,250,000 represents shipments to the Employer indirectly from out-of-State.² The record does not reflect the inflow figures for the separate stores.

It has been the consistent position of the Board that it better effectuates the purposes of the Act, and promotes the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent

¹ The Employer's name appears in the caption as amended to conform with the evidence adduced at the hearing

² Included in this class of purchases are goods valued at approximately \$300,000 which the Employer characterized as local because they were twice removed from interstate commerce. We find it unnecessary to decide whether these goods should be considered as part of local purchases or as indirect inflow inasmuch as under the jurisdictional standards set forth herein, the result would be unaffected by such a determination.

possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce. In furtherance of that policy, the Board in October 1950 adopted certain standards to govern its assertion of jurisdiction. Those standards resulted from a study of the Board's experience up to that time.

Under the 1950 plan, the Board asserted jurisdiction over retail stores and service establishments which met certain minimum standards as announced in the *Federal Dairy*,³ *Dorn's*,⁴ and *Borden*⁵ cases.

Early this year the Board undertook to study and reappraise the 1950 jurisdictional standards in the light of the Board's experience since their adoption and also in the light of changing economic conditions. Based upon that study and reappraisal it is our opinion that the jurisdictional standards established by the cited cases should be revised, insofar as retail stores and service establishments are concerned, in order to better attain the Board's long-established policy of limiting the exercise of its jurisdiction to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce.

We have therefore determined that in future cases the Board will assert jurisdiction over a company operating a single retail store or service establishment only where the store (1) has made annual purchases directly from out-of-State of at least \$1,000,000 in value (direct inflow), or (2) has made annual purchases indirectly from out-of-State of at least \$2,000,000 in value (indirect inflow), or (3) has made annual sales directly out-of-State of at least \$100,000 in value (direct outflow). As to intrastate chains of retail stores and service establishments we shall continue the practice of totaling direct inflow, indirect inflow, or direct outflow of all stores in the chain to determine whether any one of these standards is met.⁶ If the totals satisfy any one of these standards, we will assert jurisdiction over the entire chain or over any store or group of stores in it as in the past.

We have also determined that in future cases involving a multistate chain of retail stores or service establishments we will assert jurisdiction over the entire chain or any integral part of it if the annual gross sales of all stores or establishments in the chain amount to at least \$10,000,000. Otherwise we will assert jurisdiction only over those individual stores or establishments comprising integral parts of

³ *Federal Dairy Co., Inc.*, 91 NLRB 638.

⁴ *Dorn's House of Miracles, Inc.*, 91 NLRB 632.

⁵ *The Borden Company*, 91 NLRB 628. Also applicable, of course, were the standards set forth in *Stanislaus Implement and Hardware Company, Limited*, 91 NLRB 618, and *Rutledge Paper Products, Inc.*, 91 NLRB 625.

⁶ E. g. *Krambo Food Stores, Inc.*, 98 NLRB 1320.

the chain which independently satisfy the inflow or outflow standards set forth above.⁷

In the present case, it is clear that neither the total amount of direct annual inflow nor the total amount of indirect annual inflow for both stores meet the jurisdictional standards set forth above and there is no direct outflow. Therefore, we find that it would not effectuate the policies of the Act to exercise jurisdiction over the Employer's stores. Accordingly, we will dismiss the petition.⁸

[The Board dismissed the petition.]

MEMBERS MURDOCK and PETERSON, dissenting:

This is another in the series of cases announcing in decisional form and applying the Board's new jurisdictional standards where we find ourselves in disagreement with our colleagues in the majority. In the *Breeding Transfer* case⁹ we separately expressed our views on the advisability and validity of the majority's new policy; in other companion cases¹⁰ we have dealt with specific applications of some of its facets. Here we are concerned with the question whether jurisdiction should be asserted over a concern that operates two supermarkets in Tennessee, which in 1953 made purchases of \$2,360,000, of which \$1,474,000, or about 62 percent, were shipped to it directly or indirectly from outside the State. All sales are local as is characteristic of virtually all food store sales. The concern employs about 50 regular full-time and part-time workers.

Under the 1950 plan, we would have asserted jurisdiction in this case because the Employer's indirect out-of-State purchases exceeded the minimum figure of \$1,000,000 annually. Were this Employer engaged in a nonretail business, the majority would similarly take jurisdiction, for they have not altered in any manner here relevant the 1950 standards insofar as they apply to establishments other than retail stores or service establishments. But for retail stores, our colleagues have devised the following new units of jurisdictional measures: (a) If only one outlet is operated, the store must have a direct inflow of \$1,000,000, indirect inflow of \$2,000,000, or direct outflow of \$100,000; (b) if we are dealing with an intrastate chain of stores (which presumably means more than one store confined to one State), the foregoing figures are totaled for the stores and if the sum of any one category equals the minima, jurisdiction will be asserted over

⁷ See, also, the majority decision in *Breeding Transfer Company*, 110 NLRB 493

⁸ To the extent that this decision is inconsistent with *Federal Dairy Co., Inc.*, *supra*; *Dorn's House of Miracles, Inc.*, *supra*; *The Borden Company*, *supra*; *Stanislaus Implement and Hardware Company, Limited*, *supra*; *Rutledge Paper Products, Inc.*, *supra*; and other prior decisions of the Board, they are hereby overruled.

⁹ *Breeding Transfer Company*, 110 NLRB 493.

¹⁰ *Jonesboro Grain Drying Cooperative*, 110 NLRB 481; *Wilson-Oldsmobile*, 110 NLRB 534

the whole chain or any part of it regardless of the size of the unit involved; but (c) if we are confronted with a multistate chain (which we assume means a concern operating stores in more than one State), we will take jurisdiction over the chain or any link in it if the aggregate of gross sales annually totals at least \$10,000,000; if the total is less, then we will view the stores comprising the chain as if they were separate individual units, and assert or decline jurisdiction depending upon whether the store meets the tests set out in (a) above.

This rather complex formula, we are told, emerges from a study and reappraisal of the 1950 standards "in the light of the Board's experience since their adoption" and "in light of changing economic conditions." The nature of the study, lessons derived therefrom, and the rationale of the reappraisal shall doubtless forever remain locked in the breasts of our majority colleagues, for they content themselves with this classic statement of administrative fiat: "We have therefore determined. . . ." Certainly it would seem that an explication of the reasoning, if any, which leads to the announced result would appear in the very decision making the official pronouncement.¹¹

In these rather unique circumstances, we find ourselves in the strange situation of grappling with that which we do not see, although we perceive its results. If we aim a shaft at what we suppose is a vital spot, doubtless we will be shooting at shadows. We conjecture that some reasons move our colleagues in making the complex and internally inconsistent rule now announced apart from the basic motivation of the new standards to reallocate authority between Federal and State Governments pointed out in our *Breeding Transfer* opinions; it would, we suggest, be helpful not only to us but more importantly to industry and labor if they were stated. In their absence, the inference may be warranted that none in fact exists.

Because of the absence of rationale in the majority opinion, we shall confine ourselves to raising 1 or 2 questions.

The retail store area from which the Board now withdraws is one the majority must believe to be occupied by establishments essentially local in nature. We say this because we are advised that the determination is to limit the Board's exercise of jurisdiction to those retail and service establishments "whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce." Moreover, the increase in the minimal monetary standards in this field, while the old standards are retained for nonretail enterprises, implies that retail stores are much more "local" than nonretail concerns doing the same volume of interstate business. If this be correct, will the new standards achieve the goal?

¹¹ The July 1 and 15 press releases contain no explication

Our colleagues seem to view a retail store as bearing the hallmark of local enterprise. Perhaps that was so in a bygone day; but except in rural areas the specialty, department, or food store or service establishment coming within the 1950 standards scarcely can be likened to the small corner grocery.¹² If the emphasis is on the individual store, how is it that if more than one are owned by the same concern in one State, we shall henceforth regulate the labor relations of one of those units no matter how small it is, so long as the aggregate purchases or out-of-State sales of all stores in the State meet the test established for the single store? And if a multistate chain is involved, no matter how many outlets it has, why will we decline to take jurisdiction over the whole if it has less than \$10,000,000 gross sales annually, but nonetheless assert jurisdiction over any segment that meets the single store test? The incongruities lurking in this formula are legion. If we are right in reading the majority's opinion as placing prime emphasis on the individual store, then why do they abandon that end of the telescope for the other once the magic figure of \$10,000,000 in gross sales is reached in the case of a chain? The litmus paper they use must have strange properties indeed for it to change hue immediately when the \$10,000,000 figure touches it.

We think the questions we have raised are not idle; many more exist that need to be answered. Because we regard the result and the method by which it was reached to be completely out of harmony with the congressional purpose, the realities of industrial relations, and a responsible and judicious discharge of the duties committed to us, we dissent from the decision not to assert jurisdiction over this Employer.

¹² The so called "general store," as classified by the Census Bureau, is virtually now extinct. The forces responsible for this and the development of present day retail stores include a continuing increase in the number and variety of goods which are made available to the consumer through new production operations and improvements in marketing services and techniques. The concentration of manufacturing and processing operations in various parts of the country has been matched by advances in interstate transportation through improved and expedited rail, air, and truck facilities. The result has been an astounding growth in the mass marketing of perishable and staple goods which freely pass across States lines from producer to consumer. The local retail outlet has thus become an integral part of a nationwide marketing operation. See, e. g., *Marketing in the American Economy* by Vaile, Grether, and Cox, The Ronald Press Co., New York, 1952, *passim*.

MCKINNEY AVENUE REALTY COMPANY (CITY NATIONAL BANK) and
STATIONARY ENGINEERS LOCAL UNION No. 707, INTERNATIONAL
UNION OF OPERATING ENGINEERS, AFL, PETITIONER. *Case No.*
39-RC-755. October 26, 1954

Decision and Order

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before John F. Burst, hearing of-
110 NLRB No. 69.