

MAST LUMBER COMPANY, INC. *and* INTERNATIONAL WOODWORKERS OF AMERICA, CIO. *Case No. 20-CA-944. January 3, 1955*

### Decision and Order

On August 10, 1954, Trial Examiner William E. Spencer issued his Intermediate Report in the above-entitled proceeding, recommending on jurisdictional grounds that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief, and the Respondent filed a brief in support of the Intermediate Report.

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 exceptions and briefs, and the record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications:

We agree with the Trial Examiner that the complaint be dismissed on jurisdictional grounds.

The Respondent operates a saw and planing mill near Laytonville, California. Substantially all of the Respondent's sales of lumber are made f. o. b. at the sawmill, with the customers in most instances making payment in cash upon loading of the lumber onto the customers' trucks. During the calendar year 1953, the Respondent's sales had an approximate value of \$900,000. All of such sales concededly were, for Board jurisdictional purposes, wholly intrastate in character, with the exception of the following:

(1) Direct out-of-State shipments of lumber valued at \$11,724.63 were made to Ever-Seal Combination Window Company, Inc. in the State of Michigan. These shipments were the consequence of a single transaction, completed in 1953, in which the Respondent exchanged lumber of equal value for certain land owned by Ever-Seal near Laytonville, California, having book value of the \$11,724.63. In performance of the exchange agreement, the Respondent in this instance, contrary to its general practice, undertook to truck the lumber to the nearest railroad 15 miles from its sawmill, for direct shipment to Ever-Seal in Michigan. Whether, because of its alleged nonrecurring nature, the Ever-Seal transaction should be excluded from the appropriate commerce facts for Board consideration of the jurisdictional question, we need not decide. For it appears, as further shown below, that in any case the Respondent's shipments to Ever-Seal would represent its only direct outflow in 1953, and the value of such shipments

alone is insufficient to meet the Board's minimum requirement for assertion of jurisdiction on the basis of "direct outflow." See *Jonesboro Grain Drying Cooperative*, 110 NLRB 481.

(2) In 1953, the Respondent sold locally to two California companies, each of which in turn shipped substantial amounts out-of-State, lumber having a combined value of \$38,530.68.

(3) The Respondent sold to three Arizona companies lumber having combined value of \$39,622.64. The Arizona companies received deliveries and made payment for the lumber at the Respondent's sawmill, and in their own trucks hauled away the lumber from the Respondent's plant. The record does not show whether or not the Arizona companies, after taking delivery from the Respondent, proceeded to transport the lumber directly out of the State of California.

It is the position of the General Counsel that the Respondent's sales to the three Arizona companies in 1953 constituted "direct outflow," and that the value of these sales, combined with the value of the sales to Ever-Seal, satisfies the Board's "direct outflow" standard of \$50,000. We do not agree. There is no dispute that title to the lumber passed to the Arizona companies with the consummated sale and delivery at the Respondent's sawmill. Consequently, even assuming, *arguendo*, that the lumber was transported from the Respondent's plant directly out of the State of California—a finding we do not make—it cannot be held that it was the Respondent which *shipped* the lumber out of the State. The Respondent, therefore, insofar as concerns its 1953 transactions with the Arizona companies, does not fall within the "direct outflow" criteria<sup>1</sup> in the Board's jurisdictional standards as being "An enterprise which produces or handles goods and *ships* such goods out of state, or performs services outside the state in which the enterprise is located, valued at \$50,000 or more." [Emphasis supplied.] *Jonesboro Grain Drying Cooperative*, 110 NLRB 481.

As the operations of the Respondent do not meet the direct or indirect outflow tests, or any other of the Board's jurisdictional standards, as revised, we find it will not effectuate the policies of the Act to assert jurisdiction. Accordingly, we shall dismiss the complaint.

[The Board dismissed the complaint.]

<sup>1</sup> See *Homer Chevrolet*, 110 NLRB 825, involving similar transactions which the Board held, in effect, as not satisfying the criteria for "direct outflow." Members Murdock and Peterson, dissenting from such holding in the *Homer* case, deem themselves bound, however, by the majority decision therein.

#### Intermediate Report and Recommended Order

This proceeding, brought under Section 10 (b) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, was heard before me, the

duly designated Trial Examiner, at Laytonville, California, on June 16, 17, 18, and 24, 1954, pursuant to due notice to all parties. It involves the operations of a saw and planing mill near Laytonville, and since I am not convinced that the Board's recently revised standards for asserting jurisdiction have been met, I shall not here enumerate nor discuss the allegations of unfair labor practices contained in the complaint.

At its saw and planing mill in the vicinity of Laytonville, California, the Respondent is engaged in the production and sale of lumber. The nearest railroad, a one-track line not distinguished for continuous operations, is located some 15 miles away, and the only other method of transportation available to Respondent for moving its product, is by truck. As a result of the isolated location of the mill and the absence of feasible means of transportation other than by truck, a substantial amount of Respondent's sales and deliveries are made locally; i. e., at the mill.

During the calendar year 1953, Respondent's sales of manufactured lumber exceeded \$900,000 in value. Its sole shipments by rail during that period went to Ever-Seal Combination Window Company, Inc., of Michigan, hereinafter called Ever-Seal, to the amount, in value, of \$11,724.63. These shipments were in satisfaction of an exchange of 120 acres of land near Laytonville owned by Ever-Seal for lumber of equal value, and this transaction was substantially closed by shipments made by the Respondent to Ever-Seal during 1953. Upon conclusion of the Ever-Seal contract, no further such direct shipments are contemplated by the Respondent.

Also during 1953 the Respondent made sales of its product to the following out-of-State companies in the amounts listed:

American Builders Supply (hereinafter American)-----	\$18,962.06
Calizona-----	9,968.52
M. J. Maulden (hereinafter Maulden)-----	110,692.06
<b>Total</b> -----	<b>39,622.64</b>

<sup>1</sup> This finding is based on a posthearing all-party stipulation re 1953 sales to Maulden and the said stipulation is hereby ordered incorporated in the record of this proceeding as Exhibit No. R-6

The sales to these out-of-State companies were consummated at Respondent's place of business in Laytonville, the lumber being loaded on the purchaser's trucks and paid for at the mill. The evidence fails to disclose whether these out-of-State companies trucked the lumber they purchased from Respondent directly from the point of purchase to destinations outside the State, but it will be assumed, arguendo, that they did. In any event, from the time the lumber was loaded on the purchaser's trucks, the Respondent had no further control of its movement. If these sales be regarded as direct outflow, together with the sales during the same period to Ever-Seal, the total of such "direct" shipments would be of a value in excess of \$50,000, the amount required for assertion of its jurisdiction under the Board's recently revised formula pertaining to direct outflow. (34 LRR 223.) If these sales be regarded as indirect outflow, the Board's present formula which requires indirect outflow of \$100,000 in value for the taking of jurisdiction, is not satisfied.

It was shown that the Respondent made sales to two California companies each of which did out-of-State business in excess of \$25,000, and that the combined total of these sales and services amounted to approximately \$38,530.68. It was not shown, however, as required by the revised formula, that the products represented by these sales ultimately went outside the State, and in any event, the total in value of indirect outflow, if sales to American, Calizona, and Maulden be regarded as indirect, was approximately \$78,000, substantially less than the \$100,000 required. The issue at this point turns therefore on whether the sales to the three above-mentioned out-of-State firms be regarded as direct or indirect outflow.

In view of the new requirement that in order to be counted in determining jurisdiction with respect to indirect outflow, it must be shown that the selfsame goods supplied within the State to firms with a direct outflow in excess of \$25,000 in value, ultimately go outside the State, there would appear to be little distinction, in substance, between such sales and sales consummated at the seller's place of business, also delivered within the State, but to an out-of-State purchaser. In neither case does the seller transport, or assume any responsibility in the transportation of goods across States lines; in either case, the seller is at least one step removed from

the transaction which carries his products across State lines. There are of course distinctions. Where the out-of-State purchaser accepts delivery and takes title at the seller's place of business, it normally may be assumed that he forthwith transports the seller's products across State lines to his own place of business, without such intermediary steps as processing or reshipping; normally, where the purchaser has his place of business in the same State as the seller, the goods "come to rest" at the purchaser's place of business and are there processed, or at any rate, reshipped, before crossing State lines. The Board may well decide that these are distinctions of substance, and regard the sales herein to out-of-State purchasers as direct outflow, but I can find no certainty in the decisions that have come to my notice thus far, that it will do so.

The cases cited orally by the General Counsel's representative at the close of the hearing,<sup>2</sup> before the changes in the Board's jurisdictional standards had been announced, are of no assistance here since they establish merely that the Board has jurisdiction, not that the Board will now choose to assert it, and although time for filing briefs was extended well beyond the date on which the Board announced its new jurisdictional formulae, the General Counsel's representative did not choose to supplement his oral statement with a further citation of authorities, and the Union's brief was not addressed to the matter of jurisdiction. The Respondent cites *New Jersey Carpet Mills, Inc.*, 92 NLRB 604, as support for its position that the sales in question represent indirect outflow. There the sales were to an out-of-State buyer f. o. b. the seller's place of business and as precedent for asserting jurisdiction the Board cited the *Hollow Tree Lumber Company* case, 91 NLRB 635, the leading case on indirect outflow. In a more recent case, *Miami Paper Board Mills, Inc. et al.*, 109 NLRB 167, the Board again cites *Hollow Tree Lumber Company, supra*, as authority for asserting jurisdiction in a situation where the product is sold at the seller's plant for direct shipment outside the State. In the Board's Sixteenth Annual Report, for the fiscal year ending June 30, 1951, listed under Concerns Engaged Directly in Commerce, is a case in which "the Board upheld a trial examiner who rejected as immaterial evidence intended to show that two coal companies were not engaged in interstate commerce because they sold their coal to a brokerage company within the State, which in turn sold it to various out-of-State customers." *United Mine Workers of America, District 31, et al.*, 95 NLRB 546. A second case, listed under the same heading, involved an undertaking company whose argument that it was not engaged in commerce "because its responsibility for its shipments ceased when delivery was made to the local railroad station," was rejected. *Riverside Memorial Chapel, Inc.*, 92 NLRB 1594. There, the Board "held it was sufficient that the interstate shipments were initiated by the employer at the request of out-of-State clients." It is noted that in both of these cases the discussion is concerned not with whether the shipments involved constituted direct or indirect outflow, but with whether the Board had jurisdiction, and in the *Riverside* case it appears that the employer himself undertook and assumed responsibility for the interstate shipment. In still another case, this one cited by Respondent, the Board held that goods purchased locally from brokers were indirect purchases even though the goods themselves were shipped directly from out-of-State sources to the purchaser. *C. P. Evans Food Stores, Inc.*, 108 NLRB 1651.<sup>3</sup> Out of the welter of representation cases, there may well be others which treat more definitively with the problem at hand, but, if so, they have escaped my notice. I can only conclude from the more recent cases which have come to my attention, that the Board will now probably consider sales such as those made by Respondent to American, Calizona, and Maulden, as indirect rather than direct outflow and therefore will not choose to assert jurisdiction in this case. Accordingly, I am constrained to recommend dismissal of the complaint.<sup>4</sup>

<sup>2</sup> *Santa Cruz Fruit Packing Co. v. N L R. B.*, 303 U. S. 453; *N. L. R. B. v. The Good Coal Co.*, 110 F. 2d 501 (C. A. 6); *N. L. R. B. v. Cowell Portland Cement Co.*, 148 F. 2d 237 (C. A. 9)

<sup>3</sup> *Cf. Wells Dairies Cooperative*, 107 NLRB 1445

<sup>4</sup> Should the Board decide otherwise on this point, there will remain for its consideration whether the direct shipments made during 1953 to Ever-Seal, because of unusual and not likely to be repeated circumstances which gave rise to these shipments, should be counted in determining whether jurisdictional standards have been met. With this possible exception, I believe the calendar year 1953 affords a proper basis for jurisdictional findings. *Silvers Sportwear*, 108 NLRB 588