

Whippany Motor Co., Inc. and District No. 47, International Association of Machinists, AFL-CIO and Lodge No. 560, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Petitioners. *Case No. 4-RC-2818. January 12, 1956*

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Bernard Samoff, 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 operates a garage in Whippany, New Jersey, servicing and repairing heavy tractors and trailers. The Petitioners seek a unit of the Employer's mechanical maintenance and service employees. The Employer moves to dismiss the petition on jurisdictional grounds.

The record shows that the Employer's income for its last fiscal year (October 1, 1954, to September 30, 1955) was \$195,460.22. Of this total the Employer derived \$105,001.99 from Cardinale Trucking Corporation,¹ \$75,853.99 from Red Bird Truck Rental Company, and \$14,604.24 from about 35 miscellaneous sources.² During the same period Whippany made purchases of about \$56,000, all of which were shipped from within the State of New Jersey.

The Employer contends that the Board should not consider the effect upon commerce of its operations during the fiscal year October 1954 to September 1955. It argues that the great bulk of its services within that year were for Cardinale and that there will be no such work in the future because that company sold all of its tractors and trailers about April 1, 1955, and has, since that date, leased its vehicles and drivers from Red Bird, a truck rental concern. The Employer also asserts that its future receipts from services for Red Bird will

¹ Cardinale is an interstate trucking firm which derived over \$1,000,000 from its interstate operations last year and it is engaged in commerce within the meaning of the Act. *Rollo Transit Corporation, et al.*, 110 NLRB 1623.

² The Petitioner contends that the Board should consider jointly the operations of the Employer, Cardinale Trucking Corporation, and Red Bird Truck Rental Company for the purpose of making jurisdictional findings in this case. Different branches of the same family own and manage Whippany, Cardinale, and Red Bird. All three companies are located in a single group of adjacent buildings, but they occupy separate premises. Whippany maintains its own records, payroll and bank account, pays its own taxes, and establishes its own labor policies. There is no interchange of employees between Whippany and either of the other companies, and Whippany's owners have no financial interest or official status in the other concerns. Therefore, contrary to the Petitioner, we find no basis for considering the operations of the 3 firms as 1 in deciding whether to assert jurisdiction over the Employer. See *Central Dairy Products Co., Steffen's Branch*, 114 NLRB 1189.

not increase appreciably because Red Bird recently purchased new trucks on which the manufacturer is obliged to perform guaranteed services and repairs. In view of such circumstances, the Employer urges the Board not to consider its operations for the 1954-55 fiscal year which, allegedly, are no longer representative of the Employer's business, but rather to use as the measure of the Company's impact upon commerce its operations for the forthcoming year which, allegedly, will not warrant assertion of the Board's jurisdiction.

This precise argument was recently rejected by the Board in *Aroostook Federation of Farmers, Inc.*,³ wherein it held, "the Board, in applying its jurisdictional standards, has heretofore uniformly relied on the experience of an employer during the most recent calendar or fiscal year, or the 12-month period immediately preceding the hearing before the Board, where such experience was available. To rely instead, as the Employer would have us do, on employers' predictions as to their future operations would invite speculation by them as to matters within their peculiar knowledge. We do not believe that such a policy would be administratively feasible or desirable where, as here, commerce data for a recent annular period is available." We shall, therefore, contrary to the Employer, consider its operations during the 1954-55 fiscal period for the purposes of this decision.

There arises the question whether the Employer's service and repair operations fall within the Board's jurisdictional criteria for nonretail enterprises or those pertaining to retail enterprises. The Employer's income for services performed was derived from a total of approximately 37 customers. However, about 95 percent of its income was from 2 chief customers, Cardinale and Red Bird. It is clear that the Employer in the main performs services for commercial enterprises and does very little, if any, single job business with the public in general. We find therefore that the Employer's business is nonretail in nature and is governed by the criteria generally applicable under the *Jonesboro* case rule.⁴

Application here of the rules announced in the *Jonesboro* decision gives rise to one final question. With respect to situations involving indirect outflow standards, such as the instant case, *Jonesboro* drew a distinction between sales of goods or services which were "directly utilized" in the products, services, or processes of a purchaser and all other sales. As to the former the minimum sales requirement was \$100,000, for the latter it was \$200,000. Since issuance of that decision in 1954 experience has shown the general impracticability of testing, on a case by case basis, the precise type of utilization by a purchaser

³ 114 NLRB 538.

⁴ *Jonesboro Grain Drying Cooperative*, 110 NLRB 481; *Treasure State Equipment Company*, 114 NLRB 529; *J. S. Latta & Son*, 114 NLRB 1248.

of the products of the employer whose business is appraised by the Board in a particular case. We have therefore decided that the policies and purposes of the Act will as well be effectuated by abolishing the distinction between direct and nondirect utilization of goods or services and will henceforth assert jurisdiction on the basis of the indirect outflow test set out in the *Jonesboro* decision wherever the sales total \$100,000 annually, without regard to the manner in which purchasers make use of the goods or services.⁵

As the Employer, during the fiscal year here pertinent, sold goods and/or services valued in excess of \$100,000 to Cardinale, a transit company directly engaged in interstate commerce, we shall assert jurisdiction in this proceeding.

2. The labor organization named below claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:

All mechanical maintenance and service employees of the Company's Whippany, New Jersey, garage, excluding office clerical employees, professional employees, stockroom employees, guards, and supervisory employees as defined in the Act.⁶

[Text of Direction of Election omitted from publication.]

MEMBER MURDOCK, concurring:

Although welcoming the change in the *Jonesboro* standard made in this decision, I concur separately to avoid any implication which might arise from my signing the main opinion that I otherwise now approve of the *Jonesboro* standard and believe that as modified herein it represents good Board policy and needs no other changes in the light of our experience under it.

In my dissent in the *Jonesboro* case, I specifically pointed out that the introduction into that standard of the novel and undefined concepts of "direct" versus "indirect utilization" in the products, services or processes of customers to whom goods and services are furnished, as a basis for different monetary requirements, had no real basis and was one of the features which made the standard "complex and confusing."⁷ It is therefore gratifying to find the Board now recognizing the "impracticability" of such a distinction and abolishing it.

⁵ To the extent this decision is inconsistent with the rules set out in *Jonesboro Grain Drying Cooperative*, *supra*, that case is hereby overruled.

⁶ The unit is as stipulated by the parties.

⁷ *Jonesboro Grain Drying Cooperative*, 110 NLRB 481, 490-491.

I doubt that the reduction of the monetary requirement on goods and services furnished to \$100,000 in cases which would have required \$200,000 under the "indirect" utilization test will result in the assertion of jurisdiction in any significant number of cases which would otherwise have been dismissed. Nevertheless, it is a step in the right direction and, if it accomplishes no more than eliminating one of the areas of confusion and complexity under the 1954 standards, it helps to meet an important need.

In my dissent in the *Jonesboro* case I likewise took issue with the basic changes in the monetary requirements which doubled the outflow minima of the 1950 plan as well as introducing new highly restrictive standards for multistate enterprises and other restrictions calculated to reduce the Board's jurisdiction and caseload. Further liberalization of other restrictions in the *Jonesboro* and other standards is clearly indicated and I hope additional changes in the standards will follow today's step in order that we may effectuate congressional intent by according the benefits of the Act in as wide an area as possible.

MEMBER BEAN took no part in the consideration of the above Decision and Direction of Election.

American Smelting and Refining Company, Tacoma Plant and Office Employees International Union, Local 23, AFL-CIO.¹
Case No. 19-CA-1258. January 13, 1956

DECISION AND ORDER

On October 27, 1955, Trial Examiner Herman Marx issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to 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 brief in support thereof, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations

¹ The AFL and CIO having merged, we amend the identification of the Petitioner's affiliation.