

cluding that "there is a reasonable expectation that the Company under consideration will in a period of 12 months attain the minimum jurisdictional requirement."⁸ Since as aforesaid, one of the other four stores was closed in 1959, there can be no "reasonable expectation" that its 1959 sales will be repeated and no reasonable basis for considering the business done at the closed store in any computation of the Company's anticipated annual volume of business for 1960. There was no testimony in the record that the closed store would be reopened by the Company when the Philadelphia Redevelopment Authority concluded its reconstruction work. Indeed, the only testimony regarding the possibility that the closed store might be reopened was that of the accountant, that an "offer was made to Mr. Morgan to relocate at that location in the new store that they [the Redevelopment Authority] were building." There was no testimony that the "offer" was accepted by the Company, none regarding whether the Company had a legal commitment from the Authority for a new store at its old location, and none as to when, if at all, such new store would be reopened. In his brief (footnote 18) the General Counsel asserts that the store in question would "be reopened in the future" and at page 9 asserts that "it will reopen sometime in 1960," but these assertions are not supported by any testimony in the record.⁹

Moreover, I can find no support for counting the business of the closed store by projecting "back" as urged by the General Counsel. No case has been cited by him in which the Board has ever projected backwards nor has my independent research uncovered any. Indeed, the very word "project" means "to throw or cast forward,"¹⁰ the antithesis of the meaning which the General Counsel seeks to apply to it. In short, at the time of the alleged unfair labor practices (April 1960), the Company was operating only five stores. The anticipated volume of the business of the Company in these five stores on a projected basis is \$465,572.22,¹¹ and thus is still short of the minimum required by the Board for assertion of jurisdiction over retail enterprises.¹²

In view of my findings and conclusions above, I do not reach or pass on the unfair labor practices charged in the complaint.

For the foregoing reasons, and upon the basis of the foregoing findings of fact, I make the following:

CONCLUSION OF LAW

The Company's operations do not meet the Board's standards for assertion of jurisdiction over retail enterprises and it would not effectuate the policies of the Act to assert jurisdiction in this case.

[Recommendations omitted from publication.]

⁸ *General Seat and Back Mfg. Corp., supra.*

⁹ At the reopened hearing herein on July 21, the General Counsel declined a proffered opportunity to clarify the record regarding the possibility that the closed store might reopen shortly.

¹⁰ Webster's New Collegiate Dictionary, p. 675.

¹¹ See footnote 5, *supra.*

¹² *Carolina Supplies and Cement Co., supra.*

R. E. Smith and Florence B. Smith, a partnership, d/b/a Southern Dolomite and Ernest Powell, Montieth Pulver, and Emil Adkins. Cases Nos. 12-CA-1347-1, 12-CA-1347-2, and 12-CA-1347-3. January 13, 1961

DECISION AND ORDER REMANDING CASE TO THE TRIAL EXAMINER

On June 27, 1960, Trial Examiner George J. Downing issued his Intermediate Report in the above-entitled proceeding, recommending that the complaint be dismissed for the reason that the Respondents are not engaged in commerce within the meaning of the Act, as set

forth in the Intermediate Report attached hereto.¹ Thereafter, the General Counsel filed exceptions to the Intermediate Report, and a brief in support thereof.

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, and the entire record in the case, and finds merit in the General Counsel's exceptions.

The record reveals the following facts. The Respondents are engaged in the mining, selling, and spreading of dolomite limestone in Florida. Dolomite is a soil conditioner. It is either applied directly to the soil or used in small amounts as a filler in making fertilizer. During the 1959 fiscal year the Respondents' gross volume of business was in excess of \$500,000. Of this amount \$47,000.24 represented sales to fertilizer companies, \$10,620.23 to grower cooperatives, and \$26,708.46 to grower companies. Each of these customers of the Respondents is engaged in commerce in that it exports or imports directly goods and materials valued in excess of \$50,000 across State lines. The fertilizer companies are engaged in commerce through their out-of-State purchases of materials used in mixing fertilizers, while the grower cooperatives and grower companies are in commerce by virtue of their shipments of fruit and produce in interstate commerce.

Proceeding on the assumption that under the *Catalina Island* and related cases² the gross dollar volume test, standing alone, is insufficient to confer upon the Board jurisdiction contemplated by the Act, and that no proof of the Board's statutory or legal jurisdiction had been made, the Trial Examiner found that it would not effectuate the policies of the Act to assert jurisdiction in this case. Specifically, the Trial Examiner found that while the Respondent's operations affect commerce in that the Respondents sell their product to enterprises which are engaged in commerce, they do so only in indirect and remote manner, and do not have a close and intimate relation to interstate commerce.

However, jurisdiction in the instant case is not asserted on the basis of any standard stated exclusively in terms of the gross dollar volume of business. It is asserted on the ground that the operations of the Respondents meet the requirements of the \$50,000 indirect outflow-inflow test. The Board has recognized the inherent distinction between these standards.³ Under the first standard, the operations of

¹ The Intermediate Report makes no finding with respect to the unfair labor practices alleged in the complaint herein

² *Catalina Island Sightseeing Lines*, 124 NLRB 813.

³ *Southwest Hotels, Inc. (Grady Manning Hotel)*, 126 NLRB 1151, where the Board drawing distinction between the two types of standards said "Many of our standards already embody the conclusion that the Board's legal jurisdiction has been proved, since they are based on a substantial movement of goods across State lines."

an employer could satisfy the gross dollar volume test, and yet be purely local in character. Hence, some proof of legal or statutory jurisdiction would be necessary. No such situation could conceivably arise where jurisdiction is asserted on the basis of the outflow-inflow test. Under the second standard the very meeting of the standard establishes legal jurisdiction within the meaning of Section 2(6) or (7) of the Act. In establishing this standard, the Board had already concluded in the light of its experience that when the operations of the employer meet this standard, they substantially affect commerce within the meaning of the Act.⁴ Accordingly, the Board requires no further proof of legal or statutory jurisdiction in these cases.⁵

Nor is it necessary in asserting jurisdiction under the outflow-inflow standard that there be additional evidence that the operations of the employer have a substantial and direct relation to interstate commerce. The Board in establishing this standard has already determined that outflow-inflow which amounts to \$50,000, or more has a substantial and direct impact on commerce sufficient to warrant assertion of jurisdiction.⁶ Similarly, it is unnecessary in proceeding under this standard to inquire into the nature of goods or services furnished by the employer to its customers and as to whether they are utilized directly or indirectly in the goods or materials crossing State lines. The new standard requires that the employer's product merely be *used in* the operations of the interstate enterprise. The Board defined the indirect outflow as "sales of goods or services to *users* meeting any of the Board's jurisdictional standards, except the indirect outflow or indirect inflow standard."⁷ Accordingly, we find it immaterial to establish whether or not dolomite becomes an ingredient in fruits and produce which are shipped out-of-State.⁸

⁴ In the leading case which established the revised outflow-inflow standard, the Board said that the adoption of this standard "will reasonably insure that the Board will process all cases involving labor disputes which exert a pronounced impact on commerce" *Siemons Mailing Service*, 122 NLRB 81. See also *Hollow Tree Lumber Company, et al*, 91 NLRB 634.

⁵ *Hart Concrete Products Co.*, 94 NLRB 1565 (manufacturer of concrete blocks and mix concrete); *Simplot Fertilizer Company*, 100 NLRB 771 (mining of phosphate and making of fertilizer); *Siemons Mailing Service, supra* (mailing service); *Trettenero Sand & Gravel Co.*, 129 NLRB 546.

⁶ See footnote 4, *supra*.

⁷ *Siemons Mailing Service, supra* Before the *Siemons* case, the Board pointed out in *Whappany Motor Co., Inc.*, 115 NLRB 52, "the general impracticability of testing on a case to case basis, the precise nature of utilization by a purchaser of the products of the employer" and modified the then existing outflow-inflow standard by abolishing that inquiry. The Board then stated that it "will henceforth assert jurisdiction on the basis of the indirect outflow test . . . without regard to the manner in which the purchaser makes use of the goods or services"

⁸ We attach no significance, insofar as the Board's commerce jurisdiction is concerned, to the fact that the grower cooperatives and grower companies, the customers of the Respondent, are engaged in commerce by virtue of their shipment across State lines of fruits and produce, thereby suggesting that they are, wholly or in part engaged in farming and employ agricultural laborers. The Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States . . ." (Section 2(6) of the Act). It does not except from "commerce" trade or traffic in agricultural products. While Section 2(3) of the Act excepts from the term "employee" "any in-

In view of the foregoing, we find, for the purposes of this proceeding, that the Respondents herein are engaged in commerce within the meaning of the Act, and that it would effectuate the policies of the Act to assert jurisdiction and to resolve the substantive issues raised by the complaint.

[The Board remanded the above-entitled proceeding to the Trial Examiner for the preparation and issuance of a Supplemental Intermediate Report.]

dividual employed as an agricultural laborer" or an individual in the domestic service, or an individual employed as a supervisor, these exemptions from the term "employee" may not be construed as limitations on the Board's commerce jurisdiction. The latter extends to all goods and services moving across State lines regardless of their nature. Cf. *O. B. Brown Fertilizer Co.*, 110 NLRB 1912, where the Board in computing indirect outflow took in consideration the sales to the customers who were engaged in the business of growing, packing, and shipping farm products; see also *Goetz Ice Co.*, Case No. 21-RC-3892 (not published in NLRB volumes).

INTERMEDIATE REPORT

This proceeding, brought under Section 10(b) of the National Labor Relations Act, as amended (61 Stat. 136), was heard by George A. Downing, the duly designated Trial Examiner, in Tampa, Florida, on May 16 and 17, 1960, on a complaint issued by the General Counsel of the Board on March 31, 1960.

As I am convinced from the evidence that Respondents' operations are purely local and intrastate in character, I do not reach the issues of unfair labor practices as charged in the complaint and denied in Respondents' answer, for I shall recommend a dismissal of the complaint for lack of a jurisdictional showing on the basis of the stipulated facts and on undisputed testimony which may be summarized as follows:

Respondents are engaged in mining, near Palmetto, Florida, of dolomite, a form of agricultural limestone which is sold directly or indirectly (through fertilizer companies and grower cooperatives and associations) to citrus growers, truck farmers, and ranchers within the State of Florida. It is a soil conditioner, not a fertilizer, and is usually applied directly to the soil, though occasionally small amounts of it are used by Respondents' fertilizer company customers as a filler in making fertilizer. The latter customers, however, also sell such fertilizer wholly within the State, and it is consumed within the State. Thus all of Respondents' product is mined and consumed within the State; and because of its nature it does not (as the General Counsel conceded) become an ingredient of the fruits or other crops which are grown upon the land of the consumers.

But the General Counsel contends that this wholly intrastate operation falls under the Board's jurisdiction because the stipulated facts recited below showed that Respondents' business meets certain mathematical standards which the Board has prescribed. Thus it was stipulated that though no part of the limestone is exported from the State, Respondents' gross annual business exceeded \$500,000, and that each of some 13 listed customers (fertilizer companies, grower companies, and cooperatives) whose purchases from Respondents in the aggregate exceed \$84,000, was each within the jurisdictional standards of the Board and were engaged in interstate commerce in that they export or import directly goods and materials valued in excess of \$50,000 across State lines.

The listed customers included some six fertilizer companies and some seven groves, grower companies, or cooperatives. A representative of one of the fertilizer companies (offered as a typical case) testified that his company exported no part of its fertilizer, though it imported some of its materials from other States. Though the stipulation is silent, it may reasonably be presumed that the listed grower customers were covered by reason of exporting their fruits and other agricultural products in interstate commerce. The fact, indeed, seemed implicitly conceded in the colloquies at the hearing.

Respondents contend, on the basis of evidence concerning their method of soliciting orders from growers and the manner of effecting deliveries, that except for the small portion of dolomite which is used by fertilizer companies for mixing, Respondents' sales were actually made direct to the grower consumers and that the trucking and

billing by and through the other companies or cooperatives were only incidental phases of its sales to the growers. The General Counsel counters that even were Respondents' contention upheld in that regard, then the sales were at retail, and that Respondents met the Board's retail standards for coverage.

Though I regard the point as immaterial, I reject Respondents' contention that the sales in question are to be regarded as having been made directly to the consumers.¹ I also reject the General Counsel's argument that even if Respondents' contention were upheld, then the sales must be classified as retail sales. Not only were the usual indicia of retail sales lacking, but Respondents' price to the fertilizer companies for the dolomite which they sometimes used in mixing fertilizer was the same as that which was charged on direct sales to customers. Respondents were also not registered with the Florida Sales Tax Division, Retail Sales Tax.

The Board has frequently recognized in recent months that the gross dollar volume test which it prescribed in its jurisdictional standards is insufficient, standing alone, to confer upon the Board the jurisdiction contemplated by the Act, and that some proof must be made of its *legal* and *statutory* jurisdiction. *C. L. Morris, Inc.*, 127 NLRB 761; *Southwest Hotels, Inc.*, 126 NLRB 1151; *James D. Jackson*, 126 NLRB 875; *International Longshoremen & Warehousemen's Union, et al. (Catalina Island Sightseeing Lines)*, 124 NLRB 813. To determine whether such proof has been made here, it is necessary to go back to fundamentals.

Purely intrastate activities, like Respondents', may, of course, fall within Federal control, but only where a *close and intimate relation* to interstate commerce is demonstrated. *N.L.R.B. v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 37-38. The Board's jurisdiction does not obtain merely because a local activity may in some indirect and remote way affect commerce. *N.L.R.B. v. Shawnee Milling Company*, 184 F. 2d 57, 59 (C.A. 10). It does not embrace effects upon interstate commerce so indirect and remote as would effectually obliterate the distinction between what is national and what is local. *Jones & Laughlin, supra*, at 37. The Board expressly recognized the applicability of those principles and the pertinency of the cited cases in the *Catalina Island* case, *supra*.

I do not find here that "close and intimate relation" to interstate commerce which the Supreme Court spoke of in *Jones & Laughlin, supra*. Though Respondents' purely local activity may be said to "affect" commerce, it does so only in an indirect and remote manner. The fertilizer company customers are engaged in commerce only through their extrastate purchases of some of the materials used in mixing fertilizer (all sold locally), Respondents' contribution to which is inconsequential. Thus to the extent that the operations of such customers are in commerce, the effect on them, assuming a strike at Respondents' plant, would be practically nil. Something more effect is demonstrated by the sales to the grower companies and cooperatives listed in the stipulation, in that their coverage, presumably, consists of their shipment of fruit and produce in interstate commerce. However, the nature of Respondents' product is such that its use cannot be found to have "a close and intimate relation to interstate commerce."

Decisions in cases involving similar enterprises have turned, typically, not on such indirect or remote effects but on the fact that certain facets of the concerns' operations reflected either direct engagement in commerce, sales to instrumentalities of commerce for use on such instrumentalities, or sales to customers who used the product directly in manufacturing goods which were sold in commerce. In *Pembroke Limestone Corporation*, 74 NLRB 1043, for example, the Company itself not only made both purchases and sales in interstate commerce, but it sold substantial quantities of its product to the Norfolk and Western Railroad for use as ballast on its right of way and to the Virginia Department of Highways for use in the construction of State highways. In *El Dorado Limestone Company*, 84 NLRB 746, the Company's customers were manufacturing corporations (engaged in commerce) who used crushed limestone in the processing, manufacturing, and refinement of their product. In *Simplot Fertilizer Company*, 100 NLRB 771, 772, the Company mined phosphate as an integral part of its manufacture of fertilizer, large quantities of which were shipped in commerce.

For the foregoing reasons and upon the basis of the foregoing findings of fact, I make the following:

CONCLUSIONS OF LAW

1. Respondents are not engaged in commerce within the meaning of Section 2(6) of the Act.

¹ Not only were the sales billed to and paid for by the fertilizer companies and cooperatives, but the billing did not identify the consumer customer.

2. Respondents' operations do not substantially affect commerce within the meaning of Section 2(7) of the Act.

3. Assertion of jurisdiction by the Board would not effectuate the policies of the Act.

[Recommendations omitted from publication.]

Illinois Malleable Iron Company and Appleton Electric Company and Local No. 788, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, Charging Party and Local 1031, International Brotherhood of Electrical Workers, AFL-CIO, Party to the Contract. Case No. 13-CA-1866. January 16, 1961

SECOND SUPPLEMENTAL DECISION AND AMENDMENT OF ORDER

On April 16, 1958, the Board issued its Decision and Order¹ in the above-entitled matter, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and ordering that they cease and desist therefrom and take certain affirmative action, as set forth therein. On its own motion, the Board has reconsidered its decision in this proceeding, and hereby modifies and amends its Decision and Order in the following respect:

In its original Decision and Order, the Board reversed the Trial Examiner's conclusion that the Respondents had not discriminatorily refused to employ Castelluccio. Upon reconsideration of the record, the Board is of the opinion that the Trial Examiner's dismissal of the complaint as to Castelluccio should be sustained.

[The Board amended the Board's Order in this case by striking out "and William Castelluccio" from subparagraph (b) of paragraph numbered 2 and subparagraph (c) of paragraph numbered 2, and amended the notice attached as the Appendix to the Board's original Decision and Order in this case, by striking from the eighth paragraph of such notice the words "and William Castelluccio."]

[The Board dismissed the complaint insofar as it alleges that the Respondents failed and refused to reemploy William Castelluccio in violation of Section 8(a)(3) of the Act.]

MEMBER KIMBALL took no part in the consideration of the above Second Supplemental Decision and Amendment of Order.

¹ 120 NLRB 451; Supplemental Decision and Order concerning the compliance status of the Foundry Department (UAW-AFL-CIO), 127 NLRB 1509.