

Fougeron immediate and full reinstatement to their former or substantially equivalent positions, and make them whole for any loss of pay they may have suffered by reason of our discrimination against them.

EBNER BROS. PACKERS,
Employer.

Dated _____ By _____
(Representative) (Title)

NOTE.—We will notify the above named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Sixth Floor, Meacham Building, 110 West Fifth Street, Fort Worth, Texas, Telephone No. Edison 5-4211, Extension 2131, if they have any question concerning this notice or compliance with its provisions.

**James A. Deveney d/b/a Devco Diamond Rings, Petitioner and
International Jewelry Workers, Local No. 9, AFL-CIO.¹ Case
No. 17-RM-241. March 31, 1964**

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Michael J. Lucero. 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 that no question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7), of the Act for the following reasons:

The Employer seeks an election among employees at its Kansas City, Missouri, jewelry repair shop. The Union contends that it would not effectuate the policies of the Act to assert jurisdiction over the Employer's operations.

The Employer solicits jewelry repair work from retail stores, and resets diamonds in new mountings selected from the Employer's catalogue by customers of these stores; some of these stores are located outside Missouri. The Employer generally returns the jewelry to the stores by insured parcel post. The record shows that the value of jewelry returned to stores outside the State of Missouri during the year beginning April 1, 1963, when the Employer hired the first employee, would on a projected basis amount to over \$50,000. The Employer's receipts for sales and services during the 6-month period, April 1963 through September 1963, amounted to approximately \$21,000, of which

¹ The Union's name appears as amended at the hearing.

about 70 percent, or \$14,700, represented interstate business. The latter figure, projected over a 1-year period, amounts to about \$29,400.² The Employer's purchases of material, most of which is shipped to the Employer from out of State, amount to about \$1,200 per month, or \$14,400 per year.

When, as here, an Employer performs work on goods owned by others, it is the value of the Employer's sales and services, and not the value of such goods, which the Board considers in determining whether or not to assert jurisdiction.³ As the projected value of the Employer's out-of-State services and sales totals less than \$50,000 annually, and the value of goods purchased annually from out of State is also less than \$50,000, we find that the Employer's operations fail to meet the inflow-outflow standard.⁴ The evidence fails to establish that the Employer's operations meet any of the Board's other jurisdictional standards.⁵ We therefore find that it would not effectuate the policies of the Act to assert jurisdiction,⁶ and we shall dismiss the petition.⁷

[The Board dismissed the petition.]

MEMBER FANNING, dissenting:

I dissent from the majority's refusal to assert jurisdiction over the Employer's operations. While it is true that the Employer's operations do not satisfy the indirect outflow standard applied by the majority, they do satisfy the direct outflow standard.

² Although the Employer testified that it was "very possible" his out-of-State business would exceed \$50,000 during that year, the Board, in determining jurisdiction, relies on the projection of figures actually available. See *Marston Corporation*, 120 NLRB 76.

³ *Thomas Bulen McCormack, d/b/a John McCormack Co. and C. N. Hill*, 107 NLRB 606.

⁴ *Siemons Mailing Service*, 122 NLRB 81, 85.

⁵ There is no contention, and the evidence does not show, that the Employer is a member of any association or group of employers which constitutes a single employer for jurisdictional purposes.

⁶ We do not agree with our dissenting colleague that our decision herein is contrary to Section 14(c)(1) of the Act, which provides that the Board shall not decline to assert jurisdiction over operations over which it would assert jurisdiction under the standards prevailing on August 1, 1959. Prior to August 1, 1959, the Board, in the *McCormack* case, had held that where an employer performs work on, and ships outside the State, goods owned by others, it is the value of the employer's services which determines the assertion of jurisdiction. The *McCormack* case has not been overruled, and we do not agree with our dissenting colleague that later decisions made it clear that jurisdiction would be asserted solely on the basis of the value of goods shipped, or that the definition of direct outflow set forth in *Siemons Mailing Service*, was intended to overrule the *McCormack* decision. Thus, in the *Siemons Mailing Service* case itself, the Board asserted jurisdiction on the basis of the value of the services rendered by the employer and not of the goods owned by others which the employer shipped out of State. In any event, it is clear that prior to August 1, 1959, the Board had not established a definitely formulated jurisdictional standard affirmatively including operations such as Employer's, pursuant to which the Board is required by Section 14(c)(1) to assert jurisdiction herein. See *Leedom v. Fitch Sanitarium, Inc.*, 294 F. 2d 251 (C.A.D.C.).

⁷ In view of our decision herein, we find it unnecessary to rule on the Union's contentions that the petition should be dismissed on grounds of inappropriate unit and contract bar.

The Employer performs its services on articles transported across State lines. The jewelry, mounted and set by the Employer, comes, in substantial part, from Kansas and Nebraska to the Employer's place of business in Kansas City, Missouri. It comes as the result of the Employer's solicitation of such interstate business. After the Employer mounts and resets the jewelry, it is shipped back to Kansas and Nebraska retail stores for sale or delivery to their customers. The value of such jewelry exceeds \$50,000 and the Employer's operations thus meet the Board's direct outflow standard set forth in the *Siemons Mailing Service* decision,⁸ the lead decision on the Board's current jurisdictional standards.

Under Section 14(c) (1) the Board is required to assert jurisdiction over operations coming within its jurisdictional standards. The *Siemons Mailing Service* decision declares that "for the purposes of applying this standard, *direct outflow* refers to *goods shipped* or services furnished outside the State." [Emphasis in part supplied.] That language seems clear enough,⁹ and it is not until this decision, that confusion has been introduced.¹⁰ Had the Employer gone into Nebraska and Kansas to perform its services, it would only be the value of its services which would be cognizable under the direct outflow standard. Of course, in such situation the goods upon which the services would be performed would not move in interstate commerce. In the instant case, the goods do move in interstate commerce, and they are shipped to points outside the State of Missouri by the Employer. It matters not that the Employer is not selling the jewelry to its customers. The jewelry still moves in commerce, and the Board, even under the more restrictive standards promulgated in 1954, held that shipments of goods from a location of an employer

⁸ 122 NLRB 81, 85.

⁹ See, for example, *Plains Cooperative Oil Mill*, 123 NLRB 1709.

¹⁰ The *McCormack* decision interpreted a direct outflow standard which was stated in terms of the production or handling of goods destined for out-of State shipment, to mean that the employer had to actually ship the goods itself. Later decisions made it clear that an employer did not need to own, produce, or manufacture the goods it shipped in interstate commerce to satisfy that standard. See *Jonesboro Grain Drying Cooperative*, 110 NLRB 481; *C. A. Glass Company, Inc., Coachella Valley Division*, 111 NLRB 1366; *American Rice Growers Cooperative Association, Beaumont Division*, 115 NLRB 275. The direct outflow standard was revised in 1958 as part and parcel of a reexamination of all jurisdictional standards undertaken, at the prompting of the Supreme Court, for the purpose of expanding the scope of the Board's exercised jurisdiction. See the *Siemons Mailing* decision. The outflow and inflow standards set forth in *Siemons* are applicable to all nonretail enterprises not falling within an industry for which a special standard has been devised. The direct outflow standard was stated simply and solely in terms of shipment of goods in interstate commerce. No requirement of ownership of the goods involved or of their manufacture or production by the employer shipping such goods was attached. The majority's reading of such requirement into the standard is a patent restrictive revision of the standard, making it inapplicable to enterprises which it plainly was intended to cover. As I read Section 14(c) (1), Congress took away from the Board authority so to restrict the effective coverage of the Act.

in one State to another location of the same employer in another State constituted direct outflow, even though no sale was involved.¹¹ There is good reason why the *Siemons Mailing* decision did not establish sales as a necessary criterion for application of the direct outflow standard; a strike by the Employer's employees exerts the same impact on commerce by obstructing the interstate movement of the jewelry worked on and shipped by them, as would be the case if the Employer owned the jewelry and sold it to its customers. It is, of course, the impact on commerce of labor disputes at an Employer's operations, which our standards are designed to measure.

Just recently the Board asserted jurisdiction over an employer's operations on the basis of its purchases of spent grain, a waste product from a brewery's brewing operations, because the brewery had purchased whole grain from another State.¹² Jurisdiction was asserted even though the original article of commerce was hardly identifiable in the waste product purchased by the Employer, and notwithstanding that a labor dispute at his operation which would prevent him from picking up the spent grain, would have little if any effect upon the brewery's purchases of interstate grain. The refusal to assert jurisdiction over the interstate operations involved in this case cannot be reconciled with assertion of jurisdiction over the largely intrastate operations involved in the *Schwirth* case, unless it is on some theory of bulk rates.

I believe that the refusal to assert jurisdiction herein is contrary to the intent and spirit of our direct outflow standard for nonretail enterprises, and to the dictates of Section 14(c) (1). I would assert jurisdiction.

¹¹ *Frank H. Smith et al. d/b/a Frank Smith & Sons*, 111 NLRB 241; *Greenberg Mercantile Corp.*, 112 NLRB 710.

¹² *George Schwirth*, 146 NLRB 459.

Dressmakers Joint Council, International Ladies' Garment Workers Union, AFL-CIO and Susan Evans, Inc. Cases Nos. 2-CB-3438 and 2-CB-3688. April 1, 1964

DECISION AND ORDER

On November 14, 1963, Trial Examiner William Seagle issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter,

146 NLRB No. 70.