

3. There is no representation or unfair labor practice proceeding involving the same labor dispute pending before the Board.

4. The State court has made no findings of fact as to the aforesaid commerce data.

5. Although served with a copy of the petition for Advisory Opinion, no response as provided by the Board's Rules and Regulations has been filed by the Employer.

On the basis of the above, the Board is of the opinion that:

1. The Employer is a nonretail enterprise engaged in the electrical contracting business in Fort Pierce, Florida.

2. The current standard for the assertion of jurisdiction over nonretail enterprises within the Board's statutory jurisdiction requires an annual minimum of \$50,000 out-of-State inflow or outflow, direct or indirect. *Siemons Mailing Service*, 122 NLRB 81, 85. The Employer's more than \$50,000 local purchases of materials manufactured outside the State of Florida during the past 12 months constitute indirect inflow under the Board's *Siemons* decision and satisfy the current standard for the assertion of jurisdiction over nonretail enterprises.¹

Accordingly, the parties are advised under Section 102.103 of the Board's Rules and Regulations, Series 8, as amended, that on the allegations submitted herein the Board would assert jurisdiction over the Employer's operations with respect to labor disputes cognizable under Sections 8, 9, and 10 of the Act.

¹ In view of our determination herein, it has been unnecessary to consider the allegations of indirect inflow of secondary employers to the picketed Arnold project. Cf. *Amoskeag Construction Company (International Brotherhood of Electrical Workers, AFL-CIO)*, 147 NLRB 166.

Women's Bindery Union, Local No. 42, International Brotherhood of Bookbinders, AFL-CIO¹ and National Publishing Division, McCall Corporation and Washington Mailers' Union No. 29 affiliated with the International Typographical Union, AFL-CIO.² Case No. 5-CD-97. December 16, 1964

DECISION AND DETERMINATION OF DISPUTE

This is a proceeding under Section 10(k) of the National Labor Relations Act, following a charge filed by National Publishing Division, McCall Corporation, herein called the Employer, alleging that the Women's Bindery Union, Local No. 42, International Brotherhood of Bookbinders, AFL-CIO, herein called the Bindery Women, had violated Section 8(b)(4)(D) of the Act. A hearing was held

¹ Amended to conform to a motion for amendment of the pleadings made at the hearing.

² Amended as in footnote 1, *supra*.

before Hearing Officer Edward J. Gutman on April 21 and May 5, 6, and 14, 1964. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing upon the issues. The rulings of the Hearing Officer are free from prejudicial error and are hereby affirmed. Briefs have been filed by the Employer, by the Bindery Women, and by Washington Mailers' Union No. 29 affiliated with the International Typographical Union, AFL-CIO, herein called the Mailers.

Upon the entire record in this case, the National Labor Relations Board makes the following findings:

1. The business of the Employer

The Employer maintains its place of business in Washington, D.C., where it is engaged in the printing and distribution of magazines and other publications. During the year preceding the hearing, the Employer received at its place of business goods and materials directly from outside the District of Columbia valued in excess of \$50,000. During the same period of time, the Employer shipped goods and materials valued in excess of \$50,000 directly from its place of business to places located outside the District of Columbia. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved

The parties stipulated, and we find, that the Bindery Women and the Mailers are labor organizations within the meaning of the Act.

3. The dispute

A. *The background*

Among its printing and distribution activities, the Employer prints and mails two magazines for the American Red Cross. These magazines are published eight times a year. Some subscribers receive only one copy of a magazine, while others, such as schools, receive several copies in one package. For some time prior to the dispute here, a single copy of a magazine was prepared for mailing by being wrapped on a machine; packages of 2 to 20 copies were manually rolled and wrapped in open-end wrappers by an employee represented by the Mailers; and packages of more than 20 copies were wrapped and tied in square bundles, also by a mailer. Since the top and bottom edges of the multiple magazines contained in open-end wrappers were unprotected, they were often damaged in the mails. Having received complaints about this damage, the Red Cross requested the Employer to find a safer way to prepare 2 to 20

copies for mailing. The Employer settled upon the method of having such multiple copies inserted in envelopes. Under this new procedure, when magazines in precounted lots come off the automatic stitching machine, they are stacked by a printing pressman. Another employee picks up the designated stacks, containing from 2 to 20 magazines, and inserts them into envelopes. This is the work in dispute. As noted, the method formerly employed at this point was to have an employee (a mailer) roll up the multiple copies and wrap them in an addressed wrapper. After the magazines are inserted under the new method, the envelope is then stapled at the top by a woman binder. If the envelope contains more than five copies, it is then tied with cord by a mailer.

After deciding to discontinue the roll-wrapping of 2 to 20 copies and to substitute envelopes as the packaging method, beginning with the November 1963 issues, the Employer informed the parties of its intention to assign the latter work to employees represented by the Bindery Women.³ Having previously performed the roll-wrapping operation, the Mailers protested this assignment, invoked the *status quo* provision of its contract,⁴ and took the matter to arbitration. At the arbitration hearing, the Employer advocated the position that the work belonged to the bindery women, and presented supporting evidence to this effect. On January 24, 1964, the arbitrator ruled that the work of insertion of multiple copies into envelopes belonged to the Mailers. Thereafter, the Employer complied with the arbitrator's decision and permitted mailers to perform the disputed work.

On March 5, 1964, the Bindery Women wrote to the Employer, stating its understanding that the work of inserting Red Cross publications in envelopes would be performed in the latter part of March 1964 by members of a union other than the Bindery Women. It advised the Employer that if this function were not assigned to its members by March 23, 1964, all members of the Union would stop work in protest. On March 9, 1964, the Employer filed a charge against the Bindery Women under Section 8(b)(4)(D) of the Act.

B. *Applicability of the statute*

The foregoing uncontested facts afford reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. Accordingly, we find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

³ A collective-bargaining agreement between the Employer and the Bindery Women covers the period from March 1, 1962, to and including February 28, 1965.

⁴ The agreement between the Employer and the Mailers runs from May 1, 1962, to April 30, 1965.

C. *Positions of the parties*

The parties agree that the insertion into envelopes of *single* copies is properly within the jurisdiction of the Bindery Women, and that the *wrapping* of multiple copies is work belonging to the Mailers. As for the contested work, the insertion of 2 to 20 copies into envelopes, the Employer and the Bindery Women contend that the Employer's original assignment of this work to the bindery women conforms to their contract and to the practice of other publishers in the area. The Mailers argues that its contract with the Employer covers the disputed operation, and that an arbitrator's award which reached that conclusion should be given binding effect, or, if not considered binding, should nevertheless be followed in accordance with the national labor policy of favoring arbitration.

D. *Merits of the dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving consideration to various relevant factors, and the Board has held that its determination in a jurisdictional dispute case is an act of judgment based upon common sense and experience and a balancing of all relevant factors.⁵

Certain factors usually considered by the Board in these jurisdictional dispute cases provide little assistance in determining the instant dispute. For example, we do not read either of the contracts here involved as unequivocally supporting on its face the claims urged by the respective Unions. Although the jurisdictional clause of the Bindery Women contract covers "inserting," it is apparent from the context in which it is mentioned that this term is intended to refer to a process in bookbinding rather than to the mailing of periodicals. The same clause also refers to "flat mailing" and "bulk mailing," both of which might be said to pertain to the insertion of multiple copies of periodicals into envelopes. However, since it is conceded that at least one type of "bulk mailing," the wrapping of multiple copies, is work properly assigned to and performed by the mailers, it is clear that this jurisdictional term cannot be literally applied. The record gives no indication that the parties have settled upon any meaning for "flat mailing."

The Mailers contract covers, *inter alia*, the ". . . counting, wrapping, tying, and/or sacking of bulk newspapers, magazines, or periodicals." The argument that insertion of several copies of magazines into an envelope is the "wrapping" of bulk periodicals is tested by

⁵ *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402.

the fact that, although another portion of the Mailers jurisdictional clause purports to cover the “. . . wrapping of single copies of . . . periodicals . . . ,” the Mailers readily concedes that the insertion of single magazines into envelopes is Bindery Women work. If the insertion of *one magazine* into an envelope is not construed by the parties to be “wrapping,” there might seem to be an inconsistency in construing the same word to cover the insertion of *two* magazines in an envelope. However, an arbitrator duly designated by both parties to the contract to resolve disputes arising under it has interpreted the contract as supporting the Mailers claim.

In the arbitration proceeding between the Mailers and the Employer, adverted to above, the arbitrator, after considering the terms of both contracts and other relevant factors, concluded that the Mailers, on the basis of its agreement and past practice under it, was “contractually and properly” entitled to the work here under dispute. In reaching his decision, he relied on the reference to “wrapping” in the Mailers contract and further emphasized the undisputed evidence reflecting that at the Employer’s plant the packaging of multiple copies had in the past been handled by members of the Mailers.

Although, contrary to the assertion of the Mailers, we do not regard the results of the arbitration as conclusive upon our determination,⁶ neither do we ignore it completely as a relevant consideration to be weighed by us in the balance, bearing in mind that the contractual intent of the jurisdictional clause in the Mailers contract is one of the factors we must assess and that arbitration was the method agreed upon by the Employer and the Mailers to determine the intent of their contract. We take into account, of course, that the intent of the Bindery Women contract is also in issue and the arbitrator was unauthorized to make an interpretation of that contract binding on the Bindery Women. For all the foregoing reasons, we give consideration to the award of the arbitrator, but only to the extent of its intrinsic persuasiveness as related to subsidiary factors we must appraise.

⁶ Here, the Bindery Women protested the holding of the arbitration proceeding, conducted under an agreement to which it was not a party. Section 10(k) requires the Board to hear and determine jurisdictional disputes unless the parties “. . . have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute.” The clear import of this language is that unless all the parties involved in the dispute bind themselves to voluntarily settle the argument, the Board itself must determine the question. As the Bindery Women was neither a participant in the aforesaid arbitration nor bound by the agreement pursuant to which it was conducted, it is quite clear that the voluntary adjustment condition of Section 10(k) has not been met. Accordingly, the arbitrator’s award may not, contrary to the Mailers’ contention, be given binding effect in this proceeding. See *Philadelphia Typographical Union, Local No. 2 (Philadelphia Inquirer, etc.)*, 142 NLRB 36; *New Orleans Typographical Union No. 17, etc. (E. P. Rivas, Inc.)*, 147 NLRB 191.

As found above, when the Employer first decided on the new procedure for packaging 2 to 20 magazines, it initially assigned the contested work to the bindery women. In testifying as to its reasons for the assignment, the Employer made clear that it felt compelled to do so by the terms of the Bindery Women contract. While an employer's assignment of work to a particular group of employees is entitled to some, though not controlling, weight in our determination, its significance lies largely in the fact that the employer is in the best position to judge the needs of his own business, from the standpoint of operational efficiency and economy. However, we note here that the employer's assignment is based primarily on his interpretation of ambiguous contractual provisions.

Much of the hearing dealt with the Employer's past practice and the practice of other employers in the area. As for the Employer's experience, it appears that in the last 10 years the Employer has only once before employed the technique of inserting multiples copies into envelopes. For the mailings of that particular magazine, mailers performed the inserting work, although it amounted to a small percentage of the total mailing run. At least once, in 1962, the Bindery Women claimed jurisdiction over these multiple insertions, but, as appears from a letter admitted into evidence, agreed to permit mailers to insert multiple copies of the magazine into envelopes, in recognition of the restrictions imposed by the District of Columbia laws on the working hours of women.

The evidence of the area practice among other employers does not disclose an undeviating pattern. Besides the Employer, five printing and mailing firms in the District of Columbia employ individuals represented in their respective plants by both the Mailers and the Bindery Women. All five firms, members of an employers' association, are contractually bound to the two Unions by the same agreements with which we are here concerned. At these firms, the insertion technique has been used for only a relatively small proportion of their mailing. At four of the five plants, there has been no uniform practice, although bindery women have done this work much more often than the mailers. However, at the fifth plant, where this technique has been used to package small amounts of mailings of which the bulk was being packaged by the wrapping method, the mailers, not bindery women, have done this work.

Thus the evidence as to area practice indicates that insertion of multiples into envelopes has been used as a mailing technique only to a comparatively limited extent. Although the work to that limited extent has been done more generally by bindery women than by mailers, there does not appear to emerge any pattern of work assignment that is so regular, frequent, or consistent as to reflect the existence of a clearly defined area practice.

Other factors which are of assistance in some cases are not helpful in this one. Neither Union has been certified by the Board as the exclusive bargaining representative of employees engaged in performing the work in question. The work requires no special skills, and either group of employees is capable of performing it with comparable efficiency. No specific agreements regarding work distribution have been reached by the Unions, although each has acquiesced in some variations from the apparent meaning of its contract.

In the particular circumstances of this case, where other factors, in our opinion, do not clearly predominate in favor of the claim of either Union, the one factor which to us appears of most compelling significance is that under established past practice at the Employer's plant the packaging for mailing of 2 to 20 copies has been a function lodged in the Mailers unit. Although the packaging of such copies by envelope insertion rather than by wrapping involves a somewhat different technique, the difference is insubstantial; it requires no new skill or equipment, and the basic function of the work task remains the same. Further, the evidence does not establish that the trade community clearly recognizes a jurisdictional distinction between the two packaging methods. Nor does the record justify a finding that the Bindery Women has a more supportable contractual claim to the work than does the Mailers, whose contract has been interpreted by an arbitrator as encompassing that work. Transferal of the function of packaging 2 to 20 magazines from the Mailers unit to the Bindery Women unit would have the effect of subtracting from the quantum of work available for members of the Mailers unit while adding *pro tanto* to that of the Bindery Women unit. Particularly for the reasons just indicated, but only after also assessing all other relevant factors, it is our considered judgment that the Mailers has a superior claim to the disputed work at the Employer's plant. In making this determination, we are assigning the controverted work to mailers represented by the Mailers and not to that Union or its members. Furthermore, our determination is limited to the particular controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the Act, and upon the basis of the foregoing, the Board makes the following determination of the dispute.

1. Mailers in the unit represented by Washington Mailers' Union No. 29 affiliated with the International Typographical Union, AFL-CIO, are entitled to perform the work of inserting more than 1 and

less than 21 copies of magazines into envelopes for mailing at the Washington, D.C., plant of the National Publishing Division, McCall Corporation.

2. Accordingly, Women's Bindery Union, Local No. 42, International Brotherhood of Bookbinders, AFL-CIO, is not and has not been lawfully entitled to force or require National Publishing Division, McCall Corporation, to assign the work of inserting more than 1 and less than 21 copies of magazines into envelopes to members of said organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Women's Bindery Union, Local No. 42, International Brotherhood of Bookbinders, AFL-CIO, shall notify the Regional Director for Region 5, in writing, whether or not it will refrain from forcing or requiring National Publishing Division, McCall Corporation, to assign the work in dispute to its members rather than to employees represented by Washington Mailers' Union No. 29 affiliated with the International Typographical Union, AFL-CIO.

MEMBER JENKINS, dissenting:

I would find that binders in the unit represented by Women's Bindery Union, Local No. 42, International Brotherhood of Bookbinders, AFL-CIO, are entitled to the work here in dispute, the insertion of more than 1 and less than 21 copies of magazines into envelopes for mailing. I believe such an assignment is warranted because of: (1) the Employer's assignment of the disputed work, (2) fact that the Bindery Women contract most nearly describes the work in dispute, (3) area practice, and (4) efficiency and economy of operation.

The Employer attempted to assign the work to the bindery women. My colleagues imply that this assignment is of minimal aid in this case because based primarily on contract interpretation, unrelated to operational efficiency and economy. The Employer asserts, and I believe the record substantiates, that efficiency and economy of operation, which I shall discuss further, was an important consideration in the attempted assignment to the bindery women. Thus the contract assignment by the Employer is worthy of more weight in our conclusion than has been given it. Moreover, as a matter of contract interpretation the assignment was not unreasonable, for it seems to me that "flat mailing" in the Bindery Women contract most nearly describes the work in dispute.

Again, in the matter of area practice, I disagree with my colleagues in interpreting the evidence before us, for while there is in truth no

"undeviating pattern," I am satisfied that the work in dispute is generally accepted as Bindery Women work.

However, even if little weight is ascribed to contract assignment and interpretation and to area practice, one other element should be considered. This is economy and efficiency of operation. My colleagues are silent on this point, but from the following facts it must be clear that the record heavily favors assignment to the bindery women.

The disputed work can be most expeditiously performed in the area adjacent to the automatic stitching machines. Under the procedure which the Employer intended to establish if the bindery women were allowed to do the work, the magazines would be taken off the stitcher by a member of the Specialty Workers Union, and a bindery woman would stand at a table alongside the takeoff point and insert multiples (2 through 20) into envelopes. She would then hand the envelopes to a second bindery woman who would staple the envelopes closed. With the mailers doing the multiple insertions into envelopes, a mailer must be sent over from the mailroom after all singles have been prepared for mailing. The mailer would then do the inserting of multiples and turn over the envelopes for stapling to a bindery woman.⁷ Insertion into envelopes requires approximately 60 hours of work in each of 8 months. With the mailers doing the work, overtime on their part has become necessary. The Employer states that if the work is assigned to the bindery women workers, there would be no loss of jobs for the mailers although they might lose some overtime. While additional personnel might have to be hired if the work is assigned to the bindery women, since women cannot work more than 8 hours a day,⁸ the bindery women's rate is substantially less than that of the mailers and the operation can be performed by the bindery women at a lower cost to the Employer, even with additional bindery workers.

Thus, in my opinion, not only do the facts of employer assignment, contract interpretation, and area practice favor the bindery women, but such an assignment benefits the Employer in terms of efficiency and cost, and opens up possible employment opportunities for bindery women without causing any displacement of mailers. Therefore, on the basis of all the factors before us the work would most appropriately be assigned to the employees represented by the Bindery Women.

⁷ It is not beyond conjecture that in the interest of efficiency the Employer might eventually assign the stapling of the envelopes to Mailers, thus in fact reducing job opportunities for Bindery Women.

⁸ It is this factor which seemingly may have led to the initial performance of this type of work by the Mailers.