Employees may communicate directly with the Board's Regional Office, 450 Golden Gate Avenue, Room 13050, San Francisco, California, Telephone No. 556–3197, if they have any question concerning this notice or compliance with its provisions.

Ben Patrick d/b/a Westside Pattern Works *and* Pattern Makers Association of Los Angeles and Vicinity. *Case No. 21–CA–5711. February 12, 1965*

DECISION AND ORDER

On September 8, 1964, Trial Examiner James R. Hemingway issued his Decision in the above-entitled proceeding, finding that it would not effectuate the purposes of the National Labor Relations Act to assert jurisdiction over Ben Patrick d/b/a Westside Pattern Works and recommending that the complaint herein be dismissed, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief and the Respondent filed an answering brief to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Brown and Jenkins].

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 entire record in this case, including the Trial Examiner's Decision, the exceptions, and briefs, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations with the modification noted below.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts, as its Order the Order recommended by the Trial Examiner, and orders that the complaint herein be, and it hereby is, dismissed.

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[1] We agree with the Trial Examiner that the Board should not, under all the circumstances, exercise its discretion to assert jurisdiction herein. We do so, however, without adopting all the views of the Trial Examiner as to the governing principles in applying the national defense standard Cf. *Ready Mixed Concrete & Materials, Inc.*, 122 NLRB 318. In view of our determination that the complaint should be dismissed on jurisdictional grounds, we find it unnecessary to consider the findings of fact and conclusions of law based on the merits of the case, which the Trial Examiner made in order to obviate a remand in the event that the Board were to assert jurisdiction herein.

TRIAL EXAMINER'S DECISION AND RECOMMENDED ORDER

STATEMENT OF THE CASE

On December 12, 1963, Pattern Makers Association of Los Angeles and Vicinity (affiliated with Pattern Makers League of North America), herein called the Union,

filed a charge against Westside Pattern Works, a trade name for Ben Patrick, herein called Respondent, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act; on February 27, 1964, the Union filed an amended charge against Respondent, alleging violations of 8(a)(1), (3), and (5) of the Act; and on May 21, 1964, the Union filed a second amended charge against Respondent alleging violations of Section 8(a)(1) and (5) of the Act. Upon the latter charge, a complaint duly issued on May 22, 1964, against Respondent, Ben Patrick d/b/a Westside Pattern Works.

In substance, the complaint alleged that on or about July 10, 1963, and at all times thereafter, the Union represented a majority of Respondent's employees in an alleged appropriate unit; that on July 10, 1963, and continuing to the date of the complaint, the Union had requested, and was requesting, Respondent to bargain collectively with the Union; and that Respondent had, since July 10, 1963, failed and refused to bargain collectively with the Union. Following a couple of extensions of time therefor, Respondent, on June 26, 1964, filed an answer, specifically denying the substantive allegations of the complaint and denying that he was engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Pursuant to notice, a hearing was held in Los Angeles, California, before Trial Examiner James R. Hemingway. The General Counsel and Respondent were represented by legal counsel, and the Union was represented by its business agent. At the close of the hearing, Respondent, alone, argued orally on the record, but after the close of the hearing, the General Counsel, alone, filed a brief with me.

From my consideration of the evidence in the case, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Based upon the undenied portion of the allegations of the complaint, I find that Respondent is, and has been at all times material herein, an individual proprietorship doing business as Westside Pattern Works at its principal office and place of business located at 4201½ South Sepulveda Avenue, Culver City, California, herein referred to as the plant, and has been at all times material herein engaged at said plant in patternmaking. Based on a stipulation entered into at the hearing, I find as follows:

During the calendar year 1963, Respondent, in the course and conduct of its business operations, purchased and received at its plant mahogany wood valued at $342.07, the place of origin of which was outside the United States of America. Of said mahogany wood purchased, $171.67 worth was purchased from suppliers located in the State of California, which suppliers had received the same from a firm located in the State of Louisiana. Said firm had cut and a kiln-dried said mahogany wood prior to shipment and the same was transported by said suppliers to Respondent's plant in the same form in which it was received by said suppliers. The balance of said mahogany wood, in the amount of $170.40, was purchased from other firms located in the State of California which were engaged, as is Respondent, in the patternmaking business. Said mahogany wood had not been purchased by said patternmaking firms for resale but were sold to Respondent as part of the business liquidation of said firms. During the calendar 1963, Respondent, in the course and conduct of its business operations, purchased and received at its plant wax fillets valued at $34.84. Said wax fillets were transported to said plant and received from a supplier located in the State of California which had received the same from a firm located in the State of Ohio. During the calendar year 1963, Respondent, in the course and conduct of its business operations, performed services valued in the amount of $48,363.13. Approximately $12,000 of said amount represented patterns made by Respondent and sold to Aluminum Castings Company located in the city of Los Angeles, State of California, from which patterns Aluminum Castings Company made sand molds, and from which sand molds Aluminum Castings Company in turn made aluminum castings for use in connection with national defense contracts. Of said $12,000, approximately $6,000 represented patterns from which Aluminum Castings Company made castings which it in turn sold to prime contractors for use in connection with national defense contracts held by said prime contractors. Of said $12,000, the remaining $6,000 represented patterns from which Aluminum Castings Company made castings which it in turn sold to subcontractors doing business with prime contractors for use in connection with national defense contracts held by said prime contractors.

The Respondent contests jurisdiction of the Board, contending that even legal jurisdiction is lacking because the amount of commerce involved in Respondent's

imports is *de minimis*.[1] In applying a *de minimis* rule, the Board is not, of course, limited to direct interstate commerce of an employer. It may also consider the impact of the Respondent's operations upon commerce by considering indirect imports or exports. The Respondent argues that the purchase of mahogany from other patternmakers who were going out of business should not be considered as a retail sale and should not be considered in determining the amount of indirect purchases. Since this purchase was an isolated and nonrepetitive type of transaction, I am inclined to agree with this contention. Aside from the purchase mentioned, the Respondent purchased from local sellers who had obtained goods directly from outside the State of California $171.67 worth of mahogany lumber and $34.84 worth of wax fillets for a total of $206.51 worth of supplies procured in indirect commerce. Whether or not this figure is *de minimis* is a question the answer to which is not supplied by any precedent. In *N.L.R.B.* v. *Suburban Lumber Company,* 121 F. 2d 829 (C.A. 3), the court said, "*De minimis* in the law has always been taken to mean trifles—matters of a few dollars or less." But in that case the contention had been raised by a respondent which had purchased a minimum of about $150,000 worth of lumber which came directly or indirectly from out of State, and the court approved of the Board's assertion of jurisdiction. Cases in which jurisdiction is found to be lacking because the amount involved is *de minimis* are difficult to find. The *de minimis* contention, when raised in issues of jurisdiction, is rejected in most of the cases dealing therewith. The line below which the doctrine of *de minimis* applies is, therefore, difficult to fix.

However, even if the Board has legal jurisdiction on the basis of such a small figure of indirect interstate commerce, Respondent contends that the amount involved does not warrant the assertion of discretionary jurisdiction. The General Counsel's position is that the Board is not bound by any specific figure if it has legal jurisdiction and that, under the Board's present announced jurisdictional standards, no minimal dollar amount has been set in cases involving the national defense. As the Board stated in a representation case in 1958, *Ready Mixed Concrete & Materials, Inc.,* 122 NLRB 318:

> The Board has determined that it best effectuates the policies of the Act to assert jurisdiction over all enterprises, as to which the Board has statutory jurisdiction, whose operations exert a substantial impact on the national defense, irrespective of whether the enterprise's operations satisfy any of the Board's other jurisdictional standards.
>
> In adopting this standard the Board has eliminated the requirements that an enterprise's national defense operations must be directly related to national defense, must be performed pursuant to contracts or subcontracts with the Government, and must amount to at least $100,000, a year.[2] It has done so because it believes that it has a special responsibility as a Federal agency to reduce the number of labor disputes which might have an adverse effect on the Nation's defense effort. The Board believes that this responsibility can best be carried out by the more flexible standard announced herein.

In the *Ready Mixed* case, the employer was a South Carolina business which sold building materials wholly within the State of South Carolina. It had no out-of-State purchases. Of its total sales, some were made to out-of-State contractors performing work in South Carolina in the amount of $2,492. It also sold materials valued at $154,000 to general contractors engaged in construction of an Air Force base in South Carolina. The Board did not specifically state upon what it based its legal, as contrasted with its discretionary, jurisdiction. In a case [3] in which the Board based its jurisdiction upon much the same theory, this time one which based jurisdiction on architectural services rendered to the U.S. Corps of Engineers, Ladd Air Force Base, and Eielson Air Force Base in the value of $35,482 and on services connected with airstrips for Alaska's International Airport and the Alaska Department of Aviation in the value of $18,000 and $26,000, respectively, the Board stated that "the Respondents' operations exert a sufficient impact on national defense to justify our exercising jurisdiction . . . .", citing the *Ready Mixed* decision. The Board made no effort to distinguish legal jurisdiction from discretionary jurisdiction

[1] Respondent also points to the fact that the General Counsel did not prove that Aluminum Castings Company was engaged in interstate commerce. The General Counsel undertook only to the Aluminum Castings Company to national defense as heretofore stated

[2] Citing the case of *Maytag Aircraft Corp.,* 110 NLRB 594 (October 26, 1954), where that figure was first used.

[3] *Gray, Rogers, Graham & Osborne,* 129 NLRB 450.

in this case either. The Court of Appeals for the Ninth Circuit denied enforcement, stating that it found no sufficient jurisdictional basis for enforcement and was unable to find that enforcement would effectuate the statutory purposes.[4]

As applied to the case at hand, the Board's only yardstick is that of "substantial impact on the national defense." In this respect, the state of the Board's policy is similar to that which prevailed before 1954,[5] when the $100,000 limitation was adopted (in the *Maytag Aircraft* case, *supra*). But even before 1954, examples of what the Board considered substantial effect upon national defense (in terms of dollar amounts) were no more numerous than since 1958 when the *Ready Mixed* case was decided. In the *Westport* case, *supra,* the Company's total business was $21,000. It is not clear whether or not this sum came entirely from making crates under contract for the 5th Army Headquarters. If not, the amount of business done with that branch of the armed services is not shown at all. Other cases where the operations of the employer affected national defense involved at least as great a sum or greater. In the only case which I have found where the effect on national defense amounted to less—$600 for parking automobiles for the Army Recruiting Service and to other Government agencies—the Board declined to assert jurisdiction.[6]

Although it is not a required element, I note that the Respondent here has had no direct dealings with any defense agency. Its total services, all performed within the State of California, amounted to $48,363.13 in 1963. Of this amount, $12,000 represents the value of patterns made and sold by Respondent within the State of California to a casting company which used 50 percent, or $6,000 worth, thereof to make castings which the casting company in turn sold to prime contractors for use "in connection with" national defense contracts. The nature of this connection was not further explained. The other 50 percent of the value of patterns sold to the casting company was used by the latter to make castings which it sold to subcontractors doing business with primte contractors for use "in connection with" national defense contracts held by said prime contractors. The General Counsel argues that Respondent's work "is vital to the manufacture of parts that are used directly in defense projects or may even be used in the manufacture of parts in a weapon system assembly." The latter part of this argument—that Respondent's work may result in use in the manufacture of weapons—is pure speculation. No attempt was made to prove this.

The first part of the General Counsel's argument—that the Respondent's work is vital to the manufacture of parts that are used directly in defense projects—is based on an assumption that may or may not be well founded. It is not necessarily established that the Respondent's patterns are "vital" to the manufacture of "parts" that are used directly in defense projects merely because they are "used by" contractors "in connection with" national defense contracts. That connection might be either proximate or remote. Even if I could infer that the castings made by Aluminum Castings Company resulted in the manufacture of "parts" (for which there is no evidence), I could not infer that these parts actually became merged in a mechanism used by prime contractors "in connection with national defense." This presents no concept of "substantial impact" upon national defense at all. For all that appears, the parts might go into candy vending machines to be used at post exchanges.

Because the Respondent's business is small, failing to meet any other jurisdictional standard of the Board, because it is essentially local in character, and because the extent of impact on national defense is vague and indefinite, I find that it would not effectuate the policies of the Act to assert jurisdiction.[7]

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[4] *Robert P. Gray, et al., d/b/a Gray, Rogers, Graham and Osborne* v. *N.L.R.B.,* 295 F 2d 38 (C A. 9).

[5] At that time, the Board was using a test of "substantially affecting national defense." I find no essential difference between this language and "having a substantial impact on national defense." *Westport Moving and Storage Company, Crate Making Division,* 91 NLRB 902. Without fixing any minimum amount, as it did later in the *Maytag* case, *supra,* the Board on January 20, 1954, in *Louis Rubino, et al., d/b/a Alpine Mill and Lumber Company,* 107 NLRB 915, departed from the *Westport* rule and held that sales of approximately $20,000 to the United States Army did not have a sufficient effect upon national defense to warrant its asserting jurisdiction See dissenting opinion in that case.

[6] *Toledo Service Parking Company,* 96 NLRB 263

[7] Since the Board has furnished no clear guide line and may disagree with my conclusions as to jurisdiction, I have made findings of fact and conclusions of law based upon the merits of the case and have attached them hereto as an appendix so as to obviate the necessity of a remand in the event that the Board should decide to assert jurisdiction.

RECOMMENDED ORDER

I recommend that the complaint be dismissed.

APPENDIX

[To be used if Board should assert jurisdiction]

II. THE ORGANIZATION INVOLVED

It was stipulated at the hearing, and I find, that the Union is a labor organization within the meaning of the Act. It is apparent also that the Union admits to membership employees of Respondent.

III. THE UNFAIR LABOR PRACTICES

A. *Refusal to bargain*

The parties stipulated at the hearing, and I find, that all Respondent's patternmakers (if two or more in number), excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment within the meaning of Section 9(b) of the Act.

2. The Union's majority

Since the first amended charge, filed on February 27, 1964, was the first charge of refusal to bargain, we are limited by Section 10(b) of the Act, to a consideration of refusal to bargain within 6 months prior to that date, or back to September 27, 1963. The requests and refusals alleged in the complaint to have occurred between July 10 and September 27, 1963, will therefore not be considered.[1] The next request after September 27, 1963, took place in the first week of October 1963. At that time Respondent had two patternmakers who were members of the Union. A later written request to bargain was made approximately on December 18, 1963, which was rejected on December 20, 1963. On December 20, Respondent had in his employ two patternmakers who were members of the Union. At intervals, the Respondent had a maximum of four patternmakers and a minimum of none. Since the Union had two members who constituted a majority of the two employed on the date of request and refusal to bargain with the Union, I find that the Union was, by virtue of its majority, the exclusive representative of the Respondent's employees in the appropriate unit on December 20, 1963, within the meaning of Section 9(a) of the Act.

3. Refusal to bargain

During the first week in October 1963, the Union's business agent, Edgar Wiethop, accompanied by the Union's president, called on Respondent and requested that he sign a union contract. Respondent had previously been supplied by the Union with a copy of its contract. Wiethop quoted Respondent as saying that he was not ready to sign a contract.

Under date of December 17, 1963, the Union wrote to Respondent and requested recognition and a meeting for the purpose of negotiating a collective-bargaining agreement. In this letter, the Union stated that if it did not receive a reply by January 1, 1964, it would file a petition for certification. Respondent replied by letter of December 20, 1963, stating that he employed a maximum of four patternmakers, that the nature of the business resulted in fluctuations affecting employment, that currently Respondent had considerable amount of wood pattern work but anticipated laying off wood patternmakers as metal work increased and metal men were substituted for wood patternmakers. Because of this fluctuation, Respondent questioned the Union's majority.

Following receipt of Respondent's reply, the Union filed a petition for certification, but, after the filing of the first amended charge, it was withdrawn on March 5, 1964.

Because of the way counsel's question was put to Wiethop, the evidence is not clear as to whether Wiethop, in October, asked Respondent to sign the Union's existing contract or to negotiate for an individual contract. If the former, Respond-

[1] In any event there were no employees working on July 10, 1963, the date of the earliest alleged request to bargain.

ent's statement that he was not ready to sign the existing contract would not be the same as a refusal to bargain for a new, individual, contract. This difficulty is avoided in the language of the Union's letter of December 17, which does ask for recognition and negotiation. Respondent's reply was not an outright refusal to negotiation. It was a questioning of the Union's majority. The evidence is not clear whether Respondent was questioning the Union's majority because he claimed not to know which of his employees was a member of the Union or because he believed that metal workers should be included in the appropriate unit. If either was the case, I should say that Respondent was justified in putting the Union to proof in a representation proceeding. That the Respondent procured its wood patternmakers by making requests of the Union for new men does not necessarily prove that the Respondent should have known that such men were members of the Union. If the Union operated a nondiscriminatory hiring hall, patternmakers other than members of Respondent might have been referred by the Union.

On the evidence presented, I find no refusal to bargain and I recommend that the complaint be dismissed.

Sophia Electric Supply Shop, Inc. ***and*** **District 50, United Mine Workers of America.** *Case No. 9–CA–3117. February 12, 1965*

DECISION AND ORDER

On October 28, 1964, Trial Examiner George J. Bott issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed limited exceptions to Trial Examiner's Decision and a brief in support, and the Respondent filed an answering brief in opposition to General Counsel's limited exceptions to Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Brown and Jenkins].

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 Trial Examiner's Decision and the entire record in this case, including the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts, as its Order, the Order recommended by the Trial Examiner, and orders that the complaint herein be, and it hereby is, dismissed.