

Chimney & Furnace Vacuum Cleaning Corp., and Ernest Valdastrì, Sr., d/b/a A. A. A. Air Duct Cleaning Co. and Local 222, Metal, Miscellaneous Sales, Novelty & Production Workers, affiliated with International Production, Service & Sales Employees Union. Case 29-CA-507

February 20, 1968

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, JENKINS, AND ZAGORIA

On November 7, 1966, Trial Examiner Gordon J. Myatt issued his Decision in the above-entitled proceeding, recommending that the complaint be dismissed in its entirety on the ground that the record fails to establish that the Respondent's operations are sufficient to satisfy the Board's jurisdictional standards,¹ as set forth in the attached Trial Examiner's Decision.² Thereafter, the General Counsel filed exceptions to the Decision and a supporting brief.

The National Labor Relations 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 Decision, the exceptions and brief, and the entire record with respect to the jurisdictional issue, and, for the reasons appearing below, has decided not to accept the recommendation of the Trial Examiner that the complaint be dismissed, and has decided to assert jurisdiction herein.

The Trial Examiner concluded and we agree that with the addition of the amount of service rendered to two fuel companies (Harper Fuel and Gassman Coal and Oil Co.), the Respondent has performed services (direct and indirect outflow) amounting to \$49,411.72. The Trial Examiner further concluded that \$3,100 worth of services rendered to Interboro General Hospital was not includible for jurisdictional purposes because the record did not establish that the hospital's purchases of drugs and supplies came from outside New York State, and therefore there was no proof that the hospital was engaged in commerce.³ As he found the Respondent's operations did not meet the \$50,000 direct or indirect outflow standard,⁴ he recommended the complaint be dismissed.

Evidence regarding the operations of Interboro General Hospital, received by way of stipulation,

established that Interboro is a proprietary hospital with 172 beds and with a gross annual revenue in 1965 of \$2,547,000. In that year Interboro also purchased drugs and supplies from the following firms: Sherman Laboratories—\$4,000; Wyeth Laboratories—\$1,990; Abbott Laboratories—\$8,465; Pfizer Laboratories—\$8,423. All purchases were made in New York State and the hospital has no knowledge as to whether these supplies were shipped from outside the State of New York.

Since the Trial Examiner's Decision, the Board issued its decision in *Butte Medical Properties*, 168 NLRB 266, in which it promulgated a minimum jurisdictional standard for proprietary hospitals of \$250,000 in gross annual revenues. In so doing, the Board concluded that the operations of proprietary hospitals generally have a substantial impact on commerce, noting particularly the aggregate purchases of supplies and materials, the insurance payments by private health insurance companies, and the expenditures of Federal funds under the national Medicare program. With the national Medicare program now in existence⁵ and the payments for health care benefits by national insurance companies, many dollars travel to and from national insurance companies and the Federal Government which, in turn, make payments, directly or indirectly to hospitals. In *Butte*, the Board further noted that of \$1,100,000 received in gross revenue, 50 percent was revenue received from various national health insurance agencies.

Inasmuch as Interboro's gross annual revenues are approximately two and a half times that of *Butte*, it is a reasonable assumption that its payments from national health insurance companies alone would equal if not surpass those in *Butte*. In addition, Interboro purchased some \$22,878 in drugs and supplies from four drug companies, at least two of whom the Board has previously asserted jurisdiction over.⁶ In view of the foregoing, we think it reasonable to assume that Interboro is engaged in operations affecting commerce within the meaning of the Act. We find, therefore, that Respondent's services to Interboro in the amount of \$3,100 may properly be included in determining whether Respondent's operations meet the Board's jurisdictional standards.

With the addition of this \$3,100, the combined direct and indirect outflow exceeds the required \$50,000 and we find that the Respondent's operations meet the Board's jurisdictional standards. Concededly, this finding rests in part on the as-

¹ There is no contention, nor did the Trial Examiner find, that statutory or legal jurisdiction does not exist.

² The Trial Examiner's Decision makes no finding with respect to the unfair labor practices alleged in the complaint herein.

³ He made a similar finding with respect to Parsons Hospital. In view of our findings herein, we find it unnecessary to consider or pass on any jurisdictional facts concerning Parsons Hospital.

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

⁵ As the national Medicare program did not become effective until July 1, 1966, any use of Medicare payments as a basis for jurisdiction would necessarily be on a projected basis.

⁶ See *Abbott Laboratories*, 131 NLRB 569, and *Chas. Pfizer & Co., Inc.*, 162 NLRB 1501.

sumption that Interboro's operations affect commerce within the meaning of the Act. Although we would not assert jurisdiction over Interboro without a higher degree of proof as to its inclusion within the Board's jurisdiction, we believe it entirely reasonable to rely on this assumption in applying our jurisdictional standards to Respondent's operations inasmuch as, entirely aside from the assumption, the record reveals that Respondent is engaging in commerce, or in operations affecting commerce, within the meaning of the Act. Accordingly, we find that it will effectuate the policies of the Act to assert jurisdiction in this proceeding. We shall, therefore, remand this proceeding to the Trial Examiner, for resolution of the substantive issues raised by the complaint.

ORDER

It is hereby ordered that this matter be, and it hereby is, remanded to the Trial Examiner for the preparation and issuance of a Supplemental Decision setting forth his findings of fact, conclusions of law, and recommendations with respect to the unfair labor practices alleged in the complaint herein.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Trial Examiner: Upon a charge filed February 3, 1966, and an amended charge filed February 16, 1966,¹ by Local 222, Metal, Miscellaneous Sales, Novelty & Production Workers, affiliated with International Production, Service & Sales Employees Union (hereinafter referred to as the Union), a complaint was issued against Chimney & Furnace Vacuum Cleaning Corp., and Ernest Valdastris, Sr., d/b/a A.A.A. Air Duct Cleaning Co. (hereinafter referred to as the Respondent), on April 29, 1966. The complaint alleges that the Respondent violated Section 8(a)(1), (3), and (5) of the Act. The Respondent's answer, amended at the hearing, admits certain allegations of the complaint but denies Board jurisdiction over its operations and denies the commission of any unfair labor practices. This case was heard before me at Brooklyn, New York, on the following dates: June 28 through July 1 and July 18, 1966. Briefs have been received from the General Counsel and the Respondent.

Upon the entire record in this case, including my evaluation of the witnesses based on my observation of their demeanor, and on the evidence contained in the record, I make the following:

FINDINGS OF FACT

JURISDICTIONAL FINDINGS

Chimney & Furnace Vacuum Cleaning Corp., is a New York corporation engaged in the business of cleaning

chimneys, air-conditioning ducts, boilers, and furnaces. Ernest Valdastris, Sr., is the president of the corporation and his son, Ernest Valdastris, Jr., is the secretary-treasurer. These individuals are the sole owners of the corporation. Valdastris, Senior, is also the sole proprietor of A.A.A. Air Cleaning Co. and A.A.A. Chimney & Furnace Cleaning Co. The latter concerns are engaged in the identical business as the corporation. All three enterprises use the same employees interchangeably, and the same tools are used by the employees regardless of which of the business concerns contracted for the job.² All of the companies³ occupy the same office space and maintain the shop where the tools and supplies and the employees' lockers are located. The shop is approximately three blocks away from the office. Although each company has a separate telephone listing, calls are received in the office on the same telephone instruments equipped with buttons for the various lines. There are two office employees who are designated bookkeepers for the firms. Although the record is unclear as to whether both bookkeepers handle the records of all the companies, it is evident that at least one bookkeeper performs services for the A.A.A. companies as well as the corporation.⁴ The books and records of A.A.A. Air Duct Cleaning Co., and A.A.A. Chimney & Furnace Cleaning Co. are contained in a single ledger and the records are kept as the records of A.A.A. Chimney & Furnace Cleaning Co. Checks made payable to A.A.A. Air Duct Cleaning Co., or to A.A.A. Chimney & Furnace Cleaning Co., are endorsed by the latter company.

The employees receive their job assignments each morning by means of job tickets brought to the shop by one or the other of the Valdastris. The employees generally work in teams and use their own automobiles in traveling to jobsites. They are given an expense allowance by the firms for the use of their cars. In a situation where the assignment requires the employees to divide their workday between jobs contracted by the A.A.A. companies on the one hand and the corporation on the other, the firm responsible for the job which takes up the major portion of the workday bears the entire cost of the automobile allowance. Where the workday is evenly divided between A.A.A. jobs and corporation jobs, the automobile expense is shared by all of the enterprises.

In these circumstances, it is manifestly clear that Chimney & Furnace Vacuum Cleaning Corp., A.A.A. Air Duct Cleaning Co., and A.A.A. Chimney & Furnace Cleaning Co., constitute a single employer for the purposes of the Act. *Blue Cab Company and Village Cab Company*, 156 NLRB 489; *Miller Industries, Incorporated*, 152 NLRB 810; *Phototype, Inc.*, 145 NLRB 1268. These business enterprises have common ownership and control, they share the same premises and make use of a common workshop, the firms utilize the same office personnel, they employ the same service employees, and they apply identical conditions and terms of employment to these employees. In addition, it is equally clear that A.A.A. Air Duct Cleaning Co., and A.A.A. Chimney & Furnace Cleaning Co., are, for all intents and purposes, the same business enterprise. While it is true, that for business convenience, Valdastris, Senior, chooses to employ two separate business names, the facts belie any

¹ Unless otherwise noted, all dates herein refer to 1966.

² While it is not certain from this record as to which of the business concerns purchases the tools, it is evident that there is no charge-back to any of the companies for the use of the tools on any given job.

³ "Companies" is used here in its broad generic sense, and includes the corporation as well as the A.A.A. companies.

⁴ This individual is Charles Hernandez, son-in-law of Valdastris, Senior, and bookkeeper for the A.A.A. companies.

meaningful distinction between these companies. Indeed, in response to an inquiry from the Regional Office for information concerning jurisdictional facts after the charge was filed against A.A.A. Air Duct Cleaning Co., Valdastri, Senior, submitted figures from the records of A.A.A. Chimney & Furnace Cleaning Co. Thus, it is apparent that even he considers both companies to be one and the same. The mere fact that a charge was not filed against A.A.A. Chimney & Furnace Cleaning Co. does not preclude a determination that the allegations of the complaint are applicable to both A.A.A. companies and Chimney & Furnace Vacuum Cleaning Corp., as I find that they are a single employer within the meaning of the Act. *Miller Industries, Incorporated, supra; Esagro, Inc. and Esagro Valley, Inc.*, 135 NLRB 285.

The evidence discloses that the Respondent performed services within the State of New York for various companies who are themselves in commerce. In addition, the Respondent performed services outside the State of New York in the amount of \$735. The total value of the services rendered within the State concerning which there is no dispute amount to \$45,358.72.⁵ When added to the value of the services rendered outside the State of New York, the Respondent's direct and indirect outflow total \$46,093.76.⁶

In addition to the above, the record discloses that the Respondent performed services for establishments falling into the following two categories: (1) fuel oil companies; and (2) proprietary hospitals. As to the first category, the Respondent asserts that there is no showing on this record that the fuel oil companies are themselves in commerce; therefore, the amount of the services rendered to these concerns cannot be included in determining jurisdiction. I reject this contention. One of the oil companies, Harper Fuel Oil Corp., supplies fuel oil and services to commercial and residential accounts in the city of New York. Harper had a gross volume of business in 1965 in the amount of \$826,817.43. Harper's total purchases for this period were \$578,959.92, and 70 percent of these purchases were made from the Shell Oil Company plant located in Brooklyn, New York. The other oil company, Gassman Coal & Oil Company, sells fuel oil and provides heating equipment service to apartment houses located in the city of New York. During 1965, Gassman had a gross volume of business amounting to \$800,000, and made purchases of fuel oil in the amount of \$150,000. All of Gassman's purchases were made from oil companies located in the city of New York. In 1965, the Respondent performed services valued at \$2,269 for Harper and \$1,049 for Gassman. Common experience indicates that New York is not a producer of petroleum or its by-

products, such as fuel oil. Accordingly, I find that the operations of Harper and Gassman in the city of New York place these two firms in commerce under the Act. *N.L.R.B. v. Reliance Fuel Oil Corporation*, 371 U.S. 224. Consequently, the value of the services rendered by the Respondent to these enterprises constitutes indirect outflow which is to be included in determining jurisdiction. With the addition of the amount of services rendered to the two fuel oil companies, the direct and indirect outflow of the Respondent amounts to \$49,411.72. Thus, it is readily apparent that the services performed by the Respondent for the proprietary hospitals is critical in determining whether the Respondent's operations satisfy the Board's requirements for the assertion of jurisdiction.

The hospitals involved herein are Parsons Hospital and Interboro General Hospital. There is no question but that the hospitals come within a class which is exempt from the Board's jurisdiction. *Flatbush General Hospital*, 126 NLRB 144. However, it is also beyond question that the services rendered to these establishments by the Respondent can properly be included as indirect outflow provided the operations of the hospital are of the "magnitude necessary for assertion of jurisdiction over comparable non-exempt organizations." *Joseph Weinstein Electric Corp.*, 152 NLRB 25, 28;⁷ *Siemons Mailing Service, supra*. Cf. *Carroll-Naslund Disposal, Inc.*, 152 NLRB 861.

The record shows that Parsons Hospital has 145 beds, belongs to an association of private hospitals, had a gross revenue of \$1,830,694 in 1965, and purchased supplies and drugs in the amount of \$79,580 during the same period. The hospital qualifies under a Blue Cross plan and has an insurance contract, which became effective on July 1, 1966, in connection with Medicare. Parsons makes its purchases from firms in New York and there is no evidence as to what amount of the purchases, if any, involve items shipped from outside the State of New York. In 1965, the Respondent performed services for Parsons in the amount of \$2,032.

The evidence concerning Interboro General was received by way of a stipulation on the record between counsel. The stipulation provides, in substance, that Interboro is a proprietary hospital with 172 beds, and in 1965, had a gross revenue of \$2,547,000. According to the stipulation, Interboro's purchases in 1965 included drugs and supplies received from the following firms:

Sherman Laboratories	\$4,000
Wyeth Laboratories	1,990
Abbott Laboratories	8,465
Pfizer Laboratories	8,423

⁵ This amount is arrived at in the following manner:

American Airlines	\$ 3,204.87
Hertz Corporation	795.01
Roux Laboratories	255.00
Bulova Watch Company	655.20
Cities Service Oil Company	498.00
Western Electric Company	743.00
New York Telephone Company	11,004.00
United Transformer Corporation	529.75
New York University	475.00
City of New York:	
Department of Real Estate	782.70
Department of Health	85.00
Fifth Avenue Hotel Associates	650.00
William A. White & Sons, Inc.	3,678.80
Flatbush Savings Bank	235.75
I. Miller & Sons	105.00
Gimbels Department Store	20,104.89
Tishman Realty & Construction Co.	531.75
Cross & Brown Company	1,025.00
TOTAL	\$45,358.72

⁶ In its brief, the Respondent takes the position that the services rendered outside the State (\$735) cannot be added to the value of the services performed within the State for concerns which are in commerce. This position is without merit, as it is based on the mistaken premise that the latter services constitute indirect inflow rather than indirect outflow. *Siemons Mailing Service*, 122 NLRB 81.

⁷ Although the *Weinstein* case involved services to a voluntary rather than a proprietary hospital, I do not consider this distinction to be meaningful. Both types of hospitals are exempt from jurisdiction under current Board cases.

All purchases were made in New York, and the hospital has no knowledge as to whether these supplies were shipped from outside the State of New York. Nor did the General Counsel provide such proof from any other source. In 1965, the Respondent performed services for Interboro in the amount of \$3,100.

The General Counsel contends that the hospitals satisfy the Board's retail standard of \$500,000. While he concedes that there is no evidence in the record that the purchases of the hospitals originate outside the State of New York, he contends that the Board would assert jurisdiction over these institutions but for their exempt status. On the basis of this record, I do not agree. Assuming for the moment, that the retail standard is the standard that the Board would apply here in order to ascertain whether the operations of the hospitals were of "the magnitude necessary for assertion of jurisdiction over comparable non-exempt organizations," the General Counsel's proof in this case still fails in an essential respect. In *Carolina Supplies*,⁸ the case in which the current retail standard was established, the Board stated that it would "assert jurisdiction over all retail enterprises which fall within its *statutory jurisdiction* [emphasis supplied] and *which do a gross volume of business of at least \$500,000 per annum.*" In the instant case there is no showing that any of the purchases by the hospitals originated from points outside the State of New York. That such a showing is necessary is evident, even from a reading of the cases relied upon by the General Counsel. In the *Weinstein* case, where the Trial Examiner found services to a voluntary hospital to be indirect outflow, the evidence demonstrated that the hospital received goods and supplies which were shipped across State lines.⁹ Similarly, in *Carroll-Naslund*, where services to a municipality were involved, the evidence indicated that the municipality purchased goods and supplies from outside of the State in which it was located.¹⁰ The record here is barren of any such evidence.¹¹

The General Counsel also stresses the fact that Parsons Hospital is a member of an association of private hospitals, and that one of the association members is Flatbush General Hospital; this establishment was involved in a prior Board proceeding wherein the Board ruled that it would not assert jurisdiction over proprietary hospitals.¹² There is no showing on this record of the purpose for which the association exists, i.e., whether the association bargains on behalf of the member hospitals concerning employees, or whether the association makes purchases across State lines of drugs and supplies on behalf of member hospitals. Indeed, the only evidence is that Parsons and Flatbush General are both members of the association. Moreover, if it is the intention of the General Counsel to rely upon the jurisdictional facts adduced in the Board proceeding involving Flatbush General, this reliance is misplaced. The facts in that case pertained to the year 1959, and in my judgment are too remote and speculative to be of probative value in this proceeding.

Finally, the General Counsel contends that even if the services to the proprietary hospitals are not to be in-

cluded as indirect outflow, jurisdiction should be asserted nonetheless under the Board's ruling in *Tropicana Products, Inc.*, 122 NLRB 121. Again I do not agree. The ruling in that case was based on the willful refusal of the employer to provide the Board agents with the information necessary for a jurisdictional determination. Such is not the case here. At one point in the hearing, Valdastrì, Senior, testifying under Rule 43(b), professed not to have additional records in connection with the work performed by his employees. Under examination by his own counsel, however, he recalled that he kept a personal card file containing this same information. I admonished the Respondent and his attorney for what appeared to me to be less than complete disclosure in response to the General Counsel's subpoena for the Respondent's books and records. I also refused to allow examination on the information contained on the cards until the General Counsel specifically waived any objection thereto. As it developed, the information on the cards was inculpatory rather than exculpatory, and provided further avenues of exploration by the General Counsel on the issue of jurisdictional facts. Upon reflection, and after a rereading of this portion of the record, I am persuaded that the Respondent did not deliberately withhold information concerning the operations of his business enterprises. All of the Respondent's records, including the card files, were available to the General Counsel at the hearing. After the issue was raised, the card file was examined and the information contained thereon was utilized by the General Counsel. Accordingly, I find that the rule of *Tropicana Products* does not apply to the facts of this case. The most that can be said is that the Respondent employed a poor system of recordkeeping, but that is not the issue here.

In sum, I am constrained to conclude that the General Counsel has failed to establish that the Respondent's operations satisfy the Board's standard for asserting jurisdiction in this case.

CONCLUSIONS OF LAW

1. Local 222, Metal, Miscellaneous Sales, Novelty & Production Workers, affiliated with International Production, Service & Sales Employees Union, is a labor organization within the meaning of Section 2(5) of the Act.
2. Chimney & Furnace Vacuum Cleaning Corp., and Ernest Valdastrì, Sr., d/b/a A.A.A. Air Duct Cleaning Co. and A.A.A. Chimney & Furnace Cleaning Co. constitute a single employer within the meaning of the National Labor Relations Act.
3. The Respondent herein is not engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record in this case, I recommend that the complaint herein be dismissed in its entirety.

⁸ *Carolina Supplies and Cement Co.*, 122 NLRB 88, 89

⁹ *Joseph Weinstein Electric Corp.*, *supra*, 28.

¹⁰ *Carroll-Naslund Disposal, Inc.*, *supra*, 862

¹¹ This is not to suggest that the General Counsel must show purchases

of goods or supplies from outside the State in the amount of \$50,000 by the hospitals, but, in my opinion, it is necessary to show some volume of such purchases in an amount more than *de minimis*.

¹² *Flatbush General Hospital*, *supra*