

Frank Robert Walker, Jr. d/b/a Arrow Rock Materials and International Union of Operating Engineers, Local Union No. 12, AFL-CIO, Petitioner. Case 31-RC-6098

29 May 1987

ORDER DENYING REVIEW

BY CHAIRMAN DOTSON AND MEMBERS
JOHANSEN, BABSON, STEPHENS, AND
CRACRAFT

On 6 February 1987 the Regional Director issued a Decision and Direction of Election in the above-entitled proceeding in which he found, *inter alia*, that the Employer satisfied the Board's jurisdictional standards based on indirect outflow. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision. The election was conducted as scheduled on 6 March 1987 and the ballots were impounded.

We have carefully considered the arguments of the parties and, for the reasons set forth below, we deny the Employer's request for review of the Regional Director's decision.

The relevant facts are undisputed. The Employer is engaged in the operation of a sand and gravel quarry in Palmdale, California. Since it commenced operations in January 1985, all its sales have been to customers located within the State of California. During the last calendar year, the Employer sold materials valued in excess of \$50,000 to Jaqua Block, Inc. (Jaqua), a California corporation. During this same time period, Jaqua purchased a block machine valued in excess of \$50,000—which the parties stipulated was a nonrecurring capital expense—directly from a supplier located outside the State of California. In addition, during the period from November 1985 to November 1986, Jaqua purchased spare parts (noncapital expenditures) valued at approximately \$10,000 directly from sources located outside the State of California.

Based on the foregoing facts, the Regional Director concluded that Jaqua satisfies the Board's jurisdictional standards based on direct inflow, citing *East Side Sanitation Service*, 230 NLRB 632 (1977), and *Snowshoe Co.*, 212 NLRB 535 (1974), and, therefore, that jurisdiction properly may be asserted over the Employer based on an indirect outflow standard, *Siemons Mailing Service*, 122 NLRB 81, 85 (1958). We agree with the Regional Director.

It is well established that in determining whether an employer meets the Board's jurisdictional stand-

ards, "[t]he Board's practice . . . is to include non-recurring capital expenses if such expenses are not the *only* items of inflow." *East Side*, 230 NLRB 632. See also *Snowshoe Co.*, *supra*; *Cemetery Service Corp.*, 149 NLRB 604 (1964). In the instant case, Jaqua's \$10,000 of noncapital expenditures (which is twice the amount of the employer's noncapital expenditures in *East Side*), combined with its non-recurring capital expenditure of over \$50,000, is sufficient to satisfy the Board's direct inflow standard. Thus, as the parties stipulated that the Employer sold materials valued in excess of \$50,000 to Jaqua, which we find to meet one of the Board's *direct* jurisdictional standards, the Regional Director properly asserted jurisdiction over the Employer on the basis of the indirect outflow standard. *Siemons Mailing Service*.

The dissent views the assertion of jurisdiction in this case as "an extension of the Board's jurisdiction beyond previously recognized limits." We do not agree with that analysis. As shown above, in *East Side* the Board included the employer's nonrecurring capital expenditures in determining the amount of inflow. In the same manner, Jaqua's nonrecurring expenditures have been applied toward the calculation of whether *it* meets one of the Board's jurisdictional standards other than indirect inflow or indirect outflow; clearly, under *East Side*, *Snowshoe*, and *Cemetery Service Corp.*, Jaqua meets the Board's jurisdictional standards based on the amount of *its* direct inflow. Therefore, given the Employer's sales to Jaqua, it simply follows that the Employer meets the Board's indirect outflow standard for assertion of jurisdiction.

Our finding that Jaqua meets the Board's jurisdictional standard for nonretail enterprises on the basis of direct inflow results from a straightforward application of Board precedent that has been in existence for almost 23 years and that has withstood court challenge.¹ Once it is found that Jaqua meets the direct inflow standard, a routine application of the jurisdictional tests set forth in *Siemons Mailing Service* leads to the conclusion that the Employer meets the indirect outflow standard based on its sales to Jaqua. This conclusion is not an expansion of the Board's jurisdiction. Rather, it is merely the result of the application of established jurisdictional principles to the facts of this case.

Accordingly, as we believe that the Regional Director properly applied the longstanding precedent and policies of the Board, we deny the Employer's request for review.

¹ See *NLRB v. East Side Sanitation Service*, 653 F.2d 235 (6th Cir 1980), *enfg.* 234 NLRB 1099 (1978)

CHAIRMAN DOTSON, dissenting.

Contrary to my colleagues, I would grant the Employer's request for review and reverse the Regional Director's Decision and Direction of Election asserting jurisdiction over the Employer.

The Employer operates a sand and gravel quarry in California. All its sales have been within the State of California to customers located within a 75-mile radius of the quarry. During the last calendar year, the Employer sold materials valued in excess of \$50,000 to Jaqua Block, Inc., a California corporation. During the last calendar year, Jaqua Block purchased a block machine valued in excess of \$50,000 directly from a supplier located outside the State of California. The purchase of the block machine constituted a nonrecurring capital expense. Jaqua Block also purchased spare parts valued at \$10,000 directly from outside the State of California.

The Regional Director concluded that Jaqua Block satisfied the Board's jurisdictional standard based on direct inflow, and that the Board could, therefore, assert jurisdiction over the Employer on an indirect outflow standard. In finding that Jaqua Block met the direct inflow standard, the Regional Director relied on *East Side Sanitation Service*¹ and *Snowshoe Co.*,² in which the Board held that it would count nonrecurring capital expenses in applying the Board's nonretail inflow test if such expenses were not the only items of inflow.

Unlike the majority, I would not assert jurisdiction over the Employer inasmuch as I would find that Jaqua Block did not satisfy the Board's nonretail inflow standard. A one-time capital expenditure does not furnish a reliable indicator of an enterprise's effect on interstate commerce. Further, the Board has traditionally not asserted jurisdiction over an employer's business solely on the basis of nonrecurring capital expenses.³ The Board has stated that the out-of-state origin of an employer's capital equipment does not, despite the value of such equipment, transform an essentially local operation into an interstate enterprise.⁴ I see no reason for the Board to make an exception in cases where there were other items that were purchased from outside the State that could be added to the nonrecurring capital expenses to meet the Board's jurisdictional standards. Indeed, the application of *East Side Sanitation Service* results in the Board asserting jurisdiction over operations that are essentially local in nature. I would not include, even if

there are other items of inflow, nonrecurring capital expenses in determining whether the Board's nonretail inflow standard has been met. Consequently, I would overrule *East Side Sanitation Service* and *Snowshoe Co.* Inasmuch as I would not count Jaqua Block's purchase of the block machine toward meeting the Board's jurisdictional standard, I would find that it does not meet the nonretail inflow test, and not assert jurisdiction over it. I therefore would be unable to assert jurisdiction over this Employer under the indirect outflow standard.

In any event, the majority's use of Jaqua Block's nonrecurring capital expenditure to assert jurisdiction over this Employer is an extension of the Board's jurisdiction beyond previously recognized limits. The Board has never applied *East Side Sanitation Service* to an employer's customer in order to meet the indirect outflow test. The majority's use of Jaqua Block's nonrecurring capital expense to assert jurisdiction over Jaqua Block so that it may in turn assert jurisdiction over this Employer makes for an anomaly. It is difficult to conceive of many businesses whose operations are more local than a sand and gravel quarry all of whose sales are made within a 75-mile radius. I do not believe that it effectuates the policies of the Act to assert jurisdiction in these circumstances.

The extreme measures and subtle analyses used here to take jurisdiction over a local enterprise are uncalled for, even as policy. They ignore inflation's impact on the Board's jurisdictional standards. For example, the standard for retail stores (set in 1959) is an annual sales volume of \$500,000. The inflation-adjusted amount in 1983 dollars was at least \$1,600,000, using the consumer price index as a guide. Using the "GNP Deflator" series as a guide, the equivalent amount was \$1,400,000. Therefore, applying the \$500,000 standard in 1983 was the equivalent of applying a standard of circa \$170,000 in 1959.⁵ The Board is thus arguably asserting jurisdiction over businesses that would have been considered local operations in 1959. There is little call for such unplanned expansion of its jurisdiction. That jurisdiction might technically be plenary⁶ but the Board has, since 1950, employed dollar volume standards to combine optimal use of limited appropriations with maximum protection to commerce. There have been multiple increases in the

¹ 230 NLRB 632 (1977), 234 NLRB 1099 (1978) (supp.), enfd. 653 F.2d 235 (6th Cir. 1980)

² 212 NLRB 535 (1974).

³ *Magic Mountain, Inc.*, 123 NLRB 1170 (1959), *E. T. Gresham Co.*, 85 NLRB 891 (1949), *Richter Transfer Co.*, 80 NLRB 1246 (1948)

⁴ *E. T. Gresham*, id. at 892 fn. 2.

⁵ See p. 13 of my 2 November 1983 testimony before the Subcommittee on Manpower and Housing of the House Committee on Government Operations. The \$170,000 figure is an approximation arrived at by using both the "GNP Deflator" and consumer price index standards. Although inflation has slowed markedly in recent years (1981-1987), our jurisdictional standards are still afflicted by the high inflation rates of the 1970s

⁶ See, e.g., *NLRB v. Faunblatt*, 306 U.S. 601 (1939)

gross national product in the past 28 years. This fact, together with historically high inflation rates, has resulted in the Board's use of scarce resources on smaller and smaller bits of a far bigger economy. At best, this state of affairs must result, as it has here, in expending our resources on situations whose effect on commerce is almost wholly specu-

lative. We only compound the problem by the mechanical application of rules that have become incommensurable with their subject matter and purpose.

For the reasons set forth above, I would not assert jurisdiction over the Employer and, consequently, would dismiss the complaint.