

In the Matter of RETAIL SHOE AND TEXTILE SALESMEN'S UNION, LOCAL
410, AFL and A. E. CRAMER, INC.

Case No. 20-CC-53.—Decided May 18, 1950

DECISION
AND
ORDER

On March 21, 1950, Trial Examiner George A. Downing issued his Order Dismissing Complaint in the above-entitled proceeding, finding that it would not effectuate the policies of the Act to assert jurisdiction in this case, and dismissing the complaint, as set forth in the copy of the order dismissing complaint attached hereto. Thereafter, the General Counsel filed a request for review, pursuant to Section 203.27 of the Board's Rules and Regulations, and a supporting brief.

The Board¹ has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the order dismissing complaint, the General Counsel's request for review and supporting brief, and the entire record in the case. Because this Employer's retail operations are essentially local in character,² we find that it would not effectuate the policies of the Act to assert jurisdiction in this case.³ Accordingly, we affirm the Trial Examiner's dismissal of

¹ Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Houston and Styles].

² We agree with the General Counsel that the Respondent's purchases, in the amount of \$8,000, of goods which originated out of the State but were purchased from and delivered by dealers after importation into California, affect commerce within the meaning of the Act. However, that fact, together with the evidence of direct out-of-State purchases, establishes only that the Board *could legally* exercise jurisdiction in this case. It does not determine whether the Board *should* do so.

We also find, unlike the Trial Examiner, that the facts which were before the Regional Director when the consent election agreement was executed are reflected in the present record. However, for the reason stated by the Trial Examiner, we do not regard the earlier consent election proceeding as a binding determination by the Board of the jurisdiction issue in this case.

³ *Fashion Fair Shops and Millan Shop*, 88 NLRB 1512; *Josephs*, 88 NLRB 11; *Squire's, Inc.*, 88 NLRB 8, all decided after the consent election was conducted.

the complaint and deny the General Counsel's request that his ruling be reversed.⁴

ORDER

IT IS HEREBY ORDERED that the complaint against Retail Shoe and Textile Salesmen's Union, Local 410, AFL, be, and it hereby is, dismissed.

ORDER DISMISSING COMPLAINT

Upon an amended charge duly filed, the General Counsel of the National Labor Relations Board issued a complaint dated January 30, 1950, in the above-entitled matter. Respondent filed an answer denying jurisdiction and the commission of unfair labor practices.

Pursuant to notice a hearing was held on February 23, 1950, at San Francisco, California. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, to argue the issues orally, and to file briefs and/or proposed findings of fact and conclusions of law. The General Counsel filed a brief which has been considered.

At the hearing, the Respondent filed a motion to dismiss the complaint on grounds (1) that the Board was without jurisdiction and that it would not effectuate the policies of the Act for the Board to assert jurisdiction; and (2) that the complaint did not state a cause of action under Section 8 (b) (4) (C) of the National Labor Relations Act as amended (61 Stat. 136) under which it was laid.

The motion was denied on the latter grounds. Ruling was reserved on the commerce and jurisdiction grounds. The motion is now granted for reasons stated below.

A. E. Cramer, Inc. (the Employer and the charging party) is a California corporation which engages at San Francisco in the business of selling at retail men's, women's, and boys' apparel. Until September 21, 1949, it operated a single store at 99 West Portal Street, and it then opened an additional store at 160 West Portal Street.

During the calendar year 1949, it purchased for resale merchandise costing approximately \$240,000, of which \$137,000 was shipped direct to it from points outside the State of California.¹ During the same year Cramer made sales aggregating approximately \$300,000, all of which were made within the State.

These facts establish that Cramer's operations were in interstate commerce to the extent of interstate purchases of \$137,000 worth of goods annually, repre-

⁴ We find without merit the General Counsel's contention that the character of the alleged unfair labor practices are material to the jurisdictional issue. *Central Tower, Inc.*, 84 NLRB 357. We also reject the contention that the Board has no discretionary authority to dismiss a complaint on policy grounds, if legal jurisdiction does in fact exist. *Local 905 of The Retail Clerks International Association (AFL) et al. (A-1 Photo Service)*, 83 NLRB 564; *Waitresses and Cafeteria Women's Local No. 305, et al. (Haleston Drug Stores, Inc.)*, 86 NLRB 1166.

¹ An additional \$8,000 worth of goods had originated at extrastate points but were purchased from and delivered by dealers after importation into the State. The evidence was not developed sufficiently in detail that a conclusion can be reached whether such goods remained in commerce until they reached Cramer (cf. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564).

senting approximately 57 percent of its total annual purchases. The question is whether the interruption of Cramer's business by a labor dispute would substantially obstruct the free flow of interstate commerce, since it is the elimination of the causes of *substantial obstruction* to that commerce which is the declared policy of the Act (Section 1). Or, stated negatively, if the interruption of Cramer's business operations by a labor dispute would have only a remote and insubstantial effect on commerce (cf. *Haleston Drug Stores, Inc.*, 86 NLRB 1166), then it would not effectuate the policies of the Act for the Board to assert jurisdiction.

The Board has recently had occasion to consider two cases involving retail businesses of the same type as Cramer's (*Squire's, Inc.*, 88 NLRB 8, *Morris C. Lebowitz, et al., d/b/a Josephs*, 88 NLRB 11), in which the volume and the percentage of interstate purchases were greater than Cramer's and in which there was also a small percentage of interstate sales. So that a full comparison may be made of those cases with the present one, the relevant facts in the three cases are set forth in the table below:

	Cramer	Squire's	Josephs
Number of retail stores.....	2	3	1
Amount of annual purchases.....	\$240, 000	² \$406, 000	² \$204, 000
Annual purchases made in interstate commerce.....	\$137, 000+	\$225, 000	\$188, 000
Percent of purchases in interstate commerce.....	57+	80	90+
Amount of annual sales.....	\$300, 000+	\$620, 000	\$315, 000
Amount of sales in interstate commerce.....	0	{ \$6,000 (?) (less than 1 percent)	} \$17, 000+

² These and the remaining figures in this column have been converted to an annual basis for the purpose of comparison with Cramer.

The Board held in the *Squire's* case:

The operation of a small local chain of retail clothing stores such as is involved in this case is essentially local in character. We therefore find that, while the Employer's operations are not wholly unrelated to commerce, they are essentially local in character, and consequently it will not effectuate the policies of the Act to assert jurisdiction over the Employer.² Accordingly, we shall dismiss the petition.

A similar holding was made in the *Josephs* case. Those holdings, concerning businesses wholly similar to the present one and in which the volume of interstate business engaged in was greater, are considered controlling here.

The General Counsel does not attempt to distinguish the *Squire's* and *Josephs* cases on their facts. He suggests only that they involved initial petitions for representation which the Board declined, whereas here the Regional Director, on behalf of the Board, had issued a certification pursuant to the results of a consent election, which action (he argues) constituted an assumption of jurisdiction by

² *Haleston Drug Company*, 82 NLRB 1264; *Jacobs Pharmacy Co.*, 87 NLRB 309; *Tom Thumb Stores*, 87 NLRB; *Sta-Kleen Bakery*, 78 NLRB 798; *Harris Baking Company*, 79 NLRB 77. To the extent that the *King Brooks* case (84 NLRB 652) is inconsistent with this decision, it is hereby overruled.

the Board. The General Counsel cites no authority for his position, nor does he contend further, assuming *arguendo* its correctness, that the Board is without power in the present proceeding to review the Regional Director's action.

Even formal representation proceedings under Section 9 are administrative and nonadversary investigations (*N. L. R. B. v. National Mineral Company*, 134 F. 2d 424 (C. A. 7); *Pacific Plastic & Mfg. Co., Inc.*, 68 NLRB 52, 76). And where the Board's exercise of its judicial capacities under Section 10 has followed such formal proceedings, it has not considered itself precluded from reexamining questions and issues so administratively decided. See *Atlantic Brick & Tile Company*, 83 NLRB 1154, and cases cited. Such rule is certainly to be considered as applying *a fortiori* where the issue involved is the fundamental one of jurisdiction. Cf. *ibid.*

On matters less vital than jurisdiction, the Board has recognized that its administrative action in connection with a consent election was not dispositive of issues in an unfair labor practice case [*Pacific Plastic & Mfg. Co., Inc.*, *supra*]:

It is well settled that the Board's duty, imposed by Section 9, to conduct administrative non-adversary investigations to determine representatives for collective bargaining, is wholly different and distinct from the duty imposed by Section 10, to determine if unfair labor practices have been committed by an employer, and if found, to prevent their repetition. Accordingly, the Board's purely administrative action in connection with the consent election in 1941, may not be deemed to be dispositive of the issues in the instant proceeding.

No formal representation proceeding was involved here. The Board's Regulations and Statements of Procedure provide, on the filing of a representation petition, for an investigation by the Regional Director of the question, among others, whether the employer's operations affect commerce within the Act (*Procedures*, Sec. 202.17), but there is no provision that the Regional Director shall make any formal determination thereon in cases like this where the consent election procedure is followed (*ibid.* Sec. 202.18 (a); and cf. Secs. 202.18 (b), 202.19, and 202.20; and see *Regulations*, Secs. 203.55 *et seq.*).

Furthermore, if such determination is to be implied from the fact of the Regional Director's issuance of a certification (see *Regulations* Sec. 203.54; *Procedures*, Sec. 202.18 (a) (6)), the evidence which was before him in making such determination is not reflected in the present record. Therefore, the resolution of the question of jurisdiction raised by Respondent, must needs depend on the evidence now before the Board, whatever may previously have been considered by the Regional Director.

As has been shown, under that evidence a case is presented which is squarely controlled by the *Squire's* and *Josephs* rulings.

For these reasons, Respondent's motion to dismiss the complaint upon jurisdictional grounds is granted, and it is hereby

ORDERED that the complaint be dismissed in its entirety.

Any party may obtain a review of the foregoing order, pursuant to Section 203.27 of the Rules and Regulations of the Board, by filing a request therefor with the Board, stating the grounds for review, and immediately upon such filing serving a copy thereof on the Regional Director and the other parties. Unless such request for review is filed within ten (10) days from the date of this order of dismissal, the case shall be closed.

Dated at Washington, D. C., this 21st day of March 1950.

GEORGE A. DOWNING,
Trial Examiner.