

**Construction and General Laborers Local 1177 and
Qualicare-Walsh, Inc. Case 15-CC-762**

30 March 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 8 February 1983 Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified herein and to adopt the recommended Order.

The judge concluded that the General Counsel had failed to establish either legal or discretionary jurisdiction in this case. We agree that there was no proof to demonstrate the necessary discretionary jurisdictional amounts at this jobsite and, accordingly, we agree with the judge that the complaint should be dismissed.¹ Our dissenting colleague, however, would remand this proceeding to the judge to take further evidence on the issue of the Board's discretionary jurisdiction. We consider such a course inappropriate for the following reasons.

The burden of proof regarding jurisdiction, as with all other elements of a prima facie case, is on the General Counsel. As the judge noted, this is a secondary boycott proceeding. The General Counsel introduced no commerce data about the primary employer. He introduced data about only one of the secondary employers, i.e., general contractor Qualicare-Walsh. Consistent with our standards, if jurisdiction could not be established over the primary employer, the Board could still look to the affected business operations of all the secondaries at the jobsite in question to attempt to ascertain jurisdiction. Here, that meant looking to Qualicare's figures as those figures were the only ones which the General Counsel submitted. We further note that the General Counsel chose to plead jurisdiction on the basis of the complaint's allegations and chose not to supplement those allegations at the hearing. It is of no consequence that the complaint allegations were ultimately uncontested if they do

¹ Contrary to the judge, however, we note that our statutory jurisdiction was adequately established by the General Counsel by virtue of the proof that the employers are engaged in the construction industry. *Sheet Metal Workers Local 299*, 131 NLRB 1196 (1961).

not, in fact, establish discretionary jurisdiction, and we find that they do not.

While the complaint alleges that, in the past year, secondary employer Qualicare-Walsh purchased and received goods valued in excess of \$50,000 directly from points located outside the State of Louisiana, the only commerce figures relevant in this secondary boycott proceeding regarding secondary employer Qualicare are commerce facts which are applicable to the jobsite in question. But such figures, as found by the judge, are missing from the record, and we think the reading of the complaint that our colleague attempts is simply too attenuated. Moreover, our colleague, in proposing a remand to the judge to give the General Counsel an opportunity to present such figures, does not assert that such evidence is newly discovered or that it has become available only since the close of the hearing. Thus, our colleague's attempt to give the General Counsel a second chance to establish jurisdiction violates our general practice.²

We do not suggest that discretionary jurisdiction may never be waived. See *NLRB v. Erlich's, 814, Inc.*, 577 F.2d 68 (8th Cir. 1978).³ However, on the facts of the instant case, we find that the General Counsel failed to meet his burden of proof regarding jurisdiction and that the complaint itself contains insufficient allegations from which to find, even if the complaint were fully admitted, that the Board has jurisdiction. Thus, in light of our general practice and in the absence of any overriding public policy reason to the contrary, we shall dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER HUNTER, dissenting.

My colleagues adopt the judge's dismissal of the instant complaint because of the General Counsel's purported failure to establish that the Board's discretionary jurisdictional standard was met. In the unique circumstances of this case, however, I would not now dismiss the complaint but rather I

² See Sec. 102.48(d)(1) of the Board's Rules and Regulations.

³ Waiver of discretionary jurisdiction was not an issue in *Anchortank, Inc.*, 238 NLRB 290 (1977), cited in the dissent. That case involved a challenge to the propriety of the jurisdictional standard which was applied. The Board found such challenge, occurring after the close of the hearing, to be untimely. In the instant case the issue is not whether the jurisdictional standard alleged in the complaint was the proper standard, but rather whether the applicable jurisdictional standard has been met. *George E. Masker, Inc.*, 261 NLRB 118 (1982), also cited in the dissent, involved the Board's policy of waiving discretionary jurisdictional standards when a party refuses to provide the Board with commerce data.

would remand the case to the judge for the receipt of additional evidence relating to the application of the Board's discretionary jurisdictional standards.

In dismissing, the judge found that the complaint failed to establish the Board's jurisdiction over the primary employer. While he noted that, in the context of a secondary boycott proceeding, the Board will look if necessary to the business operations of all the neutral employers at the location affected by the alleged secondary boycott, he also found that the record failed to establish the Board's jurisdiction on this alternative basis. In doing so, he noted that the complaint alleged that, during the preceding 12 months, one of the neutrals (Qualicare-Walsh) purchased and received goods valued in excess of \$50,000 directly from points located outside the State of Louisiana. He discounted this evidence, however, since he found the complaint failed to allege precisely that at least \$50,000 of these goods applied to the particular jobsite in dispute. And, absent such specificity, he concluded that the General Counsel had failed to establish the necessary jurisdictional amounts, either legal or discretionary.¹

I believe that my colleagues err by adopting at this juncture the judge's dismissal. Thus, no party, including the Respondent, disputed the Board's jurisdiction at the time of the judge's decision. While the Respondent had earlier contested jurisdiction, it amended its answer at the hearing to admit those complaint allegations pertaining to jurisdiction which the judge subsequently found defective. And, while those allegations are susceptible to the reading which the judge gave them, they are likewise susceptible to another reading. As the General Counsel points out, the complaint makes specific reference to the fact that the neutral, Qualicare, was the general contractor on the Plaquemine, Louisiana jobsite at issue here, where it was in charge of constructing a new 100-bed hospital. The complaint then sets forth specific facts concerning Qualicare's direct inflow of goods into the State of Louisiana. Because there is no record evidence that Qualicare did business at any other Louisiana jobsite, the admitted amounts, according to the General Counsel, may be read to relate solely to this jobsite alone and, under this reading, our discretionary jurisdiction is established. In my view, the General Counsel's reading of the complaint is not an inapt one. And, in these unique circumstances, where the complaint may be read to establish jurisdiction, and where no party had disputed jurisdiction before the judge, I think the public policy of mediating labor

¹ My colleagues correctly modify the judge's finding regarding legal jurisdiction but, as noted below, they then forget that we deal here with our discretionary, not legal, jurisdiction.

disputes affecting commerce, which is our mandate under the Act, is not well served by affirming the judge's construction of the complaint. Further, the Board has indicated in other contexts that arguments attacking our discretionary jurisdiction may be waived.² Further, in certain limited circumstances, the Board has asserted jurisdiction even in the absence of a showing that its discretionary standards have been met.³ Given these circumstances, and in light of the public nature of our Act, I see no error in remanding this proceeding.⁴

² *Anchortank, Inc.*, 238 NLRB 290 fn. 1 (1978), and cases cited therein.
³ See, e.g., *George E. Masker, Inc.*, 261 NLRB 118 (1982). See also the theory noted in *NLRB v. Erlich's 814, Inc.*, 577 F.2d 68 (8th Cir. 1978).

⁴ While my colleagues claim that such a remand would be in contravention of Sec. 102.48(d)(1) of our Rules and Regulations, that provision also indicates that "evidence which the Board believes should have been taken at the [initial] hearing" may be taken at a hearing on remand. Thus, I see no contravention of our Rules and Regulations in such a remand.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This case was heard before me in New Orleans, Louisiana, on December 15, 1982, pursuant to the September 23, 1982 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 15 of the Board. The complaint is based on a charge filed September 15, 1982, by Qualicare-Walsh, Inc. (Qualicare) against Construction and General Laborers Local 1177 (the Respondent or Local 1177).¹

In his complaint, the General Counsel alleges that the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by picketing, about September 14, at a construction gate reserved for the exclusive use of a contractor neutral to a labor dispute the Respondent had with Deep South Maintenance and Construction Incorporated (Deep South).

By its answer, the Respondent admits certain factual matters but denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent,² I make the following

FINDINGS OF FACT

I. JURISDICTION

Qualicare, a corporation licensed to do business in the State of Louisiana, at all times material herein has been the general contractor in the construction of the Rhodes J. Spedale General Hospital at a jobsite in Plaquemine, Louisiana. During the past 12 months, Qualicare pur-

¹ All dates are for 1982 unless otherwise indicated.

² While not filing a brief, Qualicare filed a posthearing motion to reopen the record to receive certain evidence. The Respondent opposes the motion, and the General Counsel has not taken a position. In view of the conclusion I reach herein, I need not rule on such motion.

chased and received goods valued in excess of \$50,000 directly from points located outside the State of Louisiana. The Respondent admits, and I find, that Qualicare is an employer within the meaning of Section 2(2), (6), and (7) of the Act. The subject of jurisdiction is discussed further below.

II. LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview

From the admitted pleadings and certain uncontested evidence, the following facts are established. At all times material, Qualicare has been the general contractor in charge of constructing a new 100-bed hospital, the Rhodes J. Spedale General Hospital, on a 20-acre site in Plaquemine, Louisiana. Excavation of the site began about mid-August 1982. By September there were two subcontractors on the job. Deep South was the excavation contractor, and Boh Brothers Construction Company, Inc. (Boh) was the contractor performing the pile driving.

As of Friday, September 10, Deep South had two laborers, five or six operators, and a teamster working at the site. Boh had about seven employees, including about four pile drivers. Boh apparently employs laborers at times, but it does not appear that any were on this job during the relevant period here. Other than its job superintendent, G. K. Lee, it does not appear that Qualicare had any employees on the job.

J. P. Messina Construction maintains the equipment of Deep South. However, during the days in question here, Messina had no employees on the jobsite and none were scheduled to work there during this period. For several years Local 1177 has represented Messina's laborers. The Respondent also has a collective-bargaining agreement with Boh covering, presumably, that firm's laborers.³

On Friday, September 10, Johnny Bell Sr., president of Local 1177 and assistant field agent, visited the jobsite and spoke with Boh's foreman and then with Deep South's superintendent. Bell testified that one purpose of his visit was to ascertain where pickets should be placed (Tr. 74).

On Monday morning, September 13, Local 1177 established pickets at the main entrance to the jobsite. The legend on the picket signs read:

NOTICE TO THE PUBLIC
DEEP SOUTH CONSTR. IS UNFAIR
TO MEMBERS OF LABORERS LOCAL
UNION #1177 AFL-CIO
NO DISPUTE WITH ANY OTHER
EMPLOYER

The Respondent admits that at all material times it had a labor dispute with Deep South, and further admits that at no material time has it been engaged in a labor dispute with Boh. The exact nature of the Respondent's dispute with Deep South is unclear in the record.

It rained on September 13, and the picketing continued only to about noon that day.⁴ That afternoon Lee, Qualicare's job superintendent, erected two reserved gate signs. The sign established at the main entrance read:

GATE I
THIS GATE RESERVED
FOR THE EXCLUSIVE USE
OF: DEEP SOUTH
THEIR EMPLOYEES AND
MATERIAL MEN

At a separate location some 75 to 400 feet⁵ south of the main gate, Lee erected the following sign:

GATE 11
THIS GATE RESERVED
FOR THE EXCLUSIVE USE
OF: BOH BROS.
THEIR EMPLOYEES AND
MATERIAL MEN
ALL OTHERS KEEP OUT

The evidence is in conflict concerning whether the picketing extended to the second gate on Tuesday, September 14, and on Wednesday, September 15.⁶ All picketing ceased around noon on Wednesday, September 15, when the dispute apparently was resolved, and work resumed on Thursday, September 16.

The foregoing summary, while not covering all relevant facts,⁷ is sufficient for our general understanding of the case.

B. Jurisdiction Not Established

As earlier noted, the question of jurisdiction must be addressed further. The only commerce facts of record are those pertaining to Qualicare, a neutral. Although Deep South is the primary employer, there are no commerce facts about it in the record. Nor does the record

⁴ All employees of both Deep South and Boh honored the picket line and refused to work.

⁵ The distance is in dispute, and there is a conflict concerning whether an entranceway was constructed at the second sign later or was already in existence.

⁶ There also is a dispute concerning whether Messina's name was added to the sign for gate 2 (below Boh's name) on Tuesday or Wednesday, and concerning when Lee removed Messina's name.

⁷ For example, telegrams were sent to the Respondent on September 13 and 14 advising, inter alia, that picketing should be restricted to gate 1.

³ In its brief the Respondent argues that the evidence supports a finding that Deep South is a subsidiary of Messina.

contain any commerce facts about Boh, a secondary employer. While the hospital is described generally, there are no commerce facts regarding the construction in question.

In cases alleging secondary boycotts, jurisdiction normally is established by looking first to the operations of the primary employer. Where those operations do not satisfy the Board's jurisdictional standards, the business operations of all neutrals at the locations affected by the conduct involved will be considered. *Madison Building Trades Council (H & K Lathing Co.)*, 134 NLRB 517, 518 (1961), and cases cited therein.

As the only location of Qualicare affected by the picketing is the jobsite in question, the only commerce facts of Qualicare which can be considered are those which apply at this jobsite. But the record is silent as to that amount. It is immaterial that Qualicare's overall operations during the past 12 months, wherever they might have been, satisfy the jurisdictional standard. As Qualicare's operations elsewhere cannot be applied here, and as the record contains no other commerce facts, it fol-

lows that the General Counsel failed to establish the necessary jurisdictional amounts, either legal or discretionary, and the complaint must be dismissed.

CONCLUSIONS OF LAW

1. Respondent Local 1177 is a labor organization within the meaning of Section 2(5) of the Act.

2. The evidence fails to satisfy the Board's jurisdictional standard for secondary boycott cases.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The complaint is dismissed in its entirety.

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.