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Office Buildings and the NLRB

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NOTES AND COMMENTS.

OFFICE BUILDINGS AND THE NLRB

The question as to whether or not the conduct of operating an office building is such as to bring the employer of labor within the provisions of the National Labor Relations Act[1] is often a vexing and troublesome one. As far as the jurisdiction of the National Labor Relations Board is concerned, it should be noted that the Board is generally empowered "to prevent any person from engaging in any unfair labor practice . . . affecting commerce."[2] The significant phrase used in this provision, the only one providing any criterion for a determination respecting jurisdiction, is the term "affecting commerce." That term has been defined elsewhere in the National Labor Relations Act as referring to acts done "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."[3]

Re-definition, however, has been provided by the United States Supreme Court for, in *National Labor Relations Board* v. *Jones-Laughlin Steel Corporation,*[4] that court said that although "activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[5] Chief Justice Hughes there also pointed out that the scope of the power of Congress to remove obstructions from interstate commerce must be viewed in the light of the existing dual system of government, hence should not be extended to such a degree as to embrace within its purview effects upon interstate commerce which are so remote and indirect that to embrace them would actually obliterate any distinction between the local and the national government.

These observations bring into focus something of the difficulty which is to be encountered when endeavoring to determine whether the employees of any given office building are covered by the National Labor

[1] 29 U. S. C. § 151 et seq.

[2] Ibid., § 160(a).

[3] Ibid., § 152(7).

[4] 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 102 A. L. R. (2d) 1352 (1937).

[5] 301 U. S. 1 at 37, 57 S. Ct. 615, 81 L. Ed. 893 at 911, 102 A. L. R. (2d) 1352 at 1365.

Relations Act. By their very nature, buildings affixed to and forming parts of real estate typify the idea of things local and immovable in character. They suggest the very opposite of commerce which, in turn, signifies movement, flow and action. At first glance, then, it would seem impossible that any relation should exist between these two opposites. But, as more thought is given to the problem, one begins to realize that the connection between office buildings and the stream of commerce is not so improbable nor so remote as might, at first, appear. If, for instance, a dispute should arise between the management and the janitors and elevator operators of an office building, which dispute, in turn, leads to a closing of the building and a shut-down of the operations carried on therein, the resulting serious interference with business transactions conducted from the various offices located within the building could have a marked and grave influence upon the flow of goods in commerce. If, on the other hand, the amount of business conducted from the building is comparatively small, the effect of the labor dispute upon interstate commerce would be negligible in character and might be so slight as to prevent the case from entering the realm of federal jurisdiction. The broad contours of demarcation between those office building disputes which are amenable to federal jurisdiction and those which are not thus become discernible.

The position which the National Labor Relations Board has taken with respect to office building disputes in general[6] is clearly demonstrated in *Matter of Midland Building Company.*[7] A Missouri corporation there operated an office building containing some 93,000 square feet of rentable space. About twenty-one per cent. of the space was occupied by fifteen different railroad companies. Other tenants included several construction and manufacturing firms. The Board refused to take jurisdiction over a representation petition filed by a union representing the building service employees, declaring that an employer's operation of a general office building was an activity essentially local in character. In arriving at that conclusion, the Board based its opinion to some extent upon the decision of the United States Supreme Court in the case of *10 East 40th Street Building, Inc.* v. *Callus,*[8] a case arising under the provisions of the Fair Labor Standards Act.[9] Although the jurisdictional requirements of

[6] A decision by the Board to assert or to refuse to take jurisdiction will usually be of decisive importance, since the courts will, in general, refrain from disturbing a determination of the Board as to jurisdictional matters. See National Labor Relations Board v. Townsend, 185 F. (2d) 378 at 382 (1950), where the court said: "Providing the Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised."

[7] 78 NLRB 1243 (1948).

[8] 325 U. S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806 (1945).

[9] 29 U. S. C. § 201 et seq.

that statute differ somewhat from those contained in the National Labor Relations Act, the Board stressed the characterization which the Supreme Court had placed on the office building there concerned as being an establishment of essentially local nature. It may be seen, then, that a decision of the Supreme Court on a related question may be of persuasive significance in settling the question of policy determination with respect to an assertion of jurisdiction.

The Board also pointed out that while, in the case at hand, many of the tenants of the building were enterprises engaged in interstate commerce, the activities carried on in the building were predominantly clerical in nature and constituted a relatively small and unimportant part of the interstate operations. The services rendered by the building maintenance employees, in turn, were even more remote from the interstate operations of the tenants, hence it seemed unlikely that a stoppage or curtailment of the building service operations would have other than a negligible effect on interstate commerce. One basic point, then, becomes apparent if this decision is carefully considered, for the refusal of the Board, barring special circumstances, to take jurisdiction in the average office building case will undoubtedly be based upon the idea that the operation is essentially of such local nature as to have only minor effects upon the flow of goods in interstate commerce.[10]

The next question which arises, by force of the basic attitude of the Board outlined in the preceding sentence, may be formulated as follows: What are the "special circumstances" which will prompt the Board to assert jurisdiction in a case involving the operation of an office building? It is necessary, in order to find an answer to that question, to consider those cases wherein the Board has taken jurisdiction over office building disputes despite its general policy not to do so in the average case.

The case designated *Matter of International Trade Mart*[11] furnishes a good illustration. A five-story trade mart building located at New Orleans was operated by a nonprofit corporation formed to develop, promote and maintain trade and commerce between the people of the United States and those of other countries, especially in the South American republics. The building was occupied by some 108 tenants, representing over four hundred firms, about three-fourths of whom had their principal places of business outside the State of Louisiana. Seven or eight of the tenants were foreign governments. All told, merchants of twenty-six foreign countries were represented. The Board expressly found that no manu-

[10] See also Matter of Corrigan Properties, Inc., 87 NLRB 252 (1949); Matter of Central Tower, Inc., 84 NLRB 357 (1949).

[11] 87 NLRB 616 (1949).

facturing, shipping, or processing of goods was performed in the building, nor were stocks of merchandise maintained therein,[12] for the tenants confined their activities to the promotion of sales by displaying samples of their wares and the issuance of catalogs listing available merchandise, although a few tenants took orders for the shipment of goods from distribution outlets located elsewhere.

Contrary to the holding in the Midland Building case discussed above, the Board declared that the building corporation in the case at hand was not in the business simply of renting space in a general office building to a variety of tenants but rather maintained the building for the sole purpose of promoting international trade, a purpose accomplished by providing a trade mart or central exhibition space where tenants could display their products and where buyers and sellers could be brought together. The Board, therefore, drew certain conclusions which deserve to be quoted verbatim. It said: "The promotional and sales activities carried on in the mart plainly are a direct and important factor in the genesis of commercial transactions involving the shipment of goods in interstate or foreign commerce; otherwise the mart would cease to be dedicated to such use. A shutdown of the mart would have an immediate and direct adverse effect on the very interstate and foreign commerce which it was constructed to foster. It would be inaccurate and wholly unrealistic to characterize such an enterprise as 'essentially local.' We find, therefore, not simply because of the purpose for which the Employer is organized, but also because of the use to which the mart is dedicated, that the Employer's operations 'affect commerce' within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction."[13] An analysis of this decision clearly reveals one exception to the general rule, an exception which might be formulated as indicating that the Board will assert jurisdiction in office building disputes if the use of the building is devoted, either in its entirety or to a considerable extent, to the furtherance of interstate or foreign trade.

[12] The specific finding poses a question as to whether or not, if some tenants engage in manufacturing processes or store goods in an office building, the Board will assert jurisdiction. No case has been found which contains a specific answer to that question.

[13] 87 NLRB 616 at 617. In a footnote appended by the Board to this case, it pointed out that the decision in Borella v. Borden, 325 U. S. 679, 65 S. Ct. 1223, 89 L. Ed. 1865 (1945), also a case arising under the Fair Labor Standards Act, resembled the situation before it more closely than the parallel constructed between the case of 10 East 40th Street Building, Inc. v. Callus, 325 U. S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806 (1945), and the Board holding in Matter of Midland Building Company, 78 NLRB 1243 (1948). The United States Supreme Court, in the Borella case, had held that maintenance employees in an office building owned by The Borden Company and predominantly dedicated to use as a headquarters for conducting its far-flung interstate business, were necessary to the production of goods for commerce, hence were covered by the Fair Labor Standards Act.

While the use to which a building has been put has served as a criterion, another line of cases adds the element of ownership as an item having bearing upon the use of the building. In *Matter of Texas Company,*[14] for example, the corporation owning the office building there involved was engaged in producing, manufacturing and marketing crude oil and its products. It operated approximately eight thousand wells and 23 refineries situated in several states. It marketed its products through numerous dealers in all the states of the Union. There was no doubt that the company itself was engaged in interstate commerce. The office building in question, located in Houston, Texas, thirteen stories high and covering one-quarter of a city block, was occupied in its entirety by the company and its subsidiaries. The company strenuously objected to the taking of jurisdiction by the Board of a representation proceeding brought by the maintenance employees of the building, contending that the work of the maintenance employees was purely local in character, without substantial relation to trade, traffic and commerce among the states.

The Board rejected the contention, refusing to regard the building maintenance operations of the company as something entirely separate and distinct from its admitted interstate business. The office building was not operated as a separate enterprise but as one of the executive offices from which a substantial part of the vast interstate enterprise was directed. In that connection, the Board pointed out that its stand had been inferentially approved by several of the Courts of Appeal of the United States which had granted enforcement to several of its orders directing reinstatement of building maintenance employees, or the carrying on of collective bargaining with representatives of both production and building maintenance employees, in cases where the employer had carried on an interstate business or industry from its own building.[15]

In this and in other similar cases reaching the same result, the building was owned and operated, in its entirety, by the employer for the purpose of carrying on an interstate business. What of the situation where the corporate owner uses only part of the building for its own purposes and rents the balance of the space to various tenants? The

[14] 21 NLRB 110 (1940).

[15] In Matter of American Potash & Chemical Corporation, 3 NLRB 140 (1937), the Board had directed reinstatement with back pay of a "relief" janitor found to have been discriminated against. The order was subsequently enforced in National Labor Relations Board v. American Potash & Chemical Corp., 98 F. (2d) 488 (1938), cert. den. 306 U. S. 643, 59 S. Ct. 582, 83 L. Ed. 1043 (1939). Board orders directing that collective bargaining be carried on with representatives of both production and maintenance employees have also been enforced by the U. S. Court of Appeals in National Labor Relations Board v. Piqua Munising Wood Products Co., 109 F. (2d) 552 (1940), and in National Labor Relations Board v. Louisville Refining Co., 102 F. (2d) 678 (1939).

answer to this question may be found in the case of *Butler Brothers* v. *National Labor Relations Board*[16] as well as in certain Board decisions dealing with that problem.[17] In the Butler Brothers case, the company, engaged in large scale interstate sales transactions, operated two 15-story buildings in Chicago known as Buildings A and B. The buildings were separated by a city street. While the company had its store and warehouse in building A, it occupied only a small portion of the other building and leased the remainder thereof to some forty tenants who were engaged generally in the manufacture, sale and distribution of goods throughout the country.

In an unfair labor practice case involving the company and its maintenance employees in both buildings, the Court of Appeals, enforcing an order of the Board, expressly recognized the Board's jurisdiction with respect to the office buildings in question. It declared that the maintenance employees performed a service directly connected with and for the benefit not only of the company but of the many tenants as well. Since the company and its various tenants were engaged in interstate commerce, the services of the maintenance employees, in hauling freight and passengers to and from the offices and in cleaning and maintaining the lobbies and stairways, were closely associated with the flow of interstate commerce so as to entitle these employees to the protection of the statute involved.

It is obvious that the court, in reaching this decision, not only took into consideration the interstate activities of the company which owned and partly occupied the building but also the character of the activities of the various tenants who occupied a considerable portion of the space in one of the buildings. In another case, that of *Matter of Southern California Edison Company, Ltd.*,[18] however, one in which the company owned and operated a 13-story office building and occupied only forty per cent. of the rentable space to house its executive offices, the Board did not concern itself with the character of the rest of the tenants who had rented more than a majority of the space but asserted jurisdiction by pointing to the fact that the operations of the company affected interstate commerce, that a disturbance among the building maintenance employees would interfere with the operation of the office building, and that the work performed in the executive offices constituted an integral and necessary part of the enterprise.

The Board went one step farther in *Matter of First National Bank*

[16] 134 F. (2d) 981 (1943), cert. den. 320 U. S. 789, 64 S. Ct. 203, 88 L. Ed. 475 (1943).

[17] See, for example, Matter of Tri-State Casualty Ins. Co., 83 NLRB 828 (1949).

[18] 56 NLRB 1172 (1944).

Building Corporation[19] for it there asserted jurisdiction not on the basis of legal ownership of the building but upon the ground of actual control, cutting across legal technicalities to achieve its decision. The corporation holding title to the building concerned had, as its only business, the operation of an office building. It, in turn, was owned by the two tenants, a bank and a railroad, both being engaged in interstate commerce. The bank owned fifty-one per cent. of the stock of the building corporation and occupied fifteen per cent. of the rentable space. The railroad owned the balance of the stock and occupied the remainder of the space. The Board held that the operation of the building affected interstate commerce. In order to reach that conclusion, it had to distinguish the case before it from the Midland Building situation. It did so by pointing to the fact that the operation did not involve a general office building but, rather, dealt with a combination of two employers, each engaged in interstate commerce, joining for the purpose of procuring necessary business and office space through the medium of a wholly-owned subsidiary. It saw no significant difference between the instant situation and one in which a single company, engaged in interstate commerce, directly provides its own office building from which to carry on business.

A logical sequel developed in the case of *Matter of Intertown Corporation.*[20] The Michigan corporation there concerned owned and had its office and principal place of business in a 34-story office building in Detroit, Michigan. The corporation was engaged in the business of owning and operating real estate, operating as a real estate broker, and making loans and investments. Among its tenants in the building were retail stores, insurance companies, bus companies, a radio station, sales agencies, advertising companies, doctors, and a miscellany of other tenants. The corporation was one of a large group of apparently closed corporations forming a pyramid dominated by one man who was the president of most of them. It owned controlling interests in two of the insurance companies maintaining their home offices in the building, as well as in a real estate corporation, a coach company, and other corporations operating outside the state. These factors prompted the Board to hold the building operation to be one which affected interstate commerce.

When these cases are considered as a group, it becomes apparent that the decisive element in the relation of the operation of an office building to interstate commerce will be the purpose for which the building is designated and the use to which it has been devoted. If the building is devoted to the furtherance of interstate and foreign trade either (a)

[19] 87 NLRB 1109 (1949).

[20] 90 NLRB No. 151 (1950).

directly, as by providing exhibition and office space to out-of-state business enterprises,[21] or (b) indirectly, as by being owned or controlled by some industry engaged in interstate commerce which uses the entire building or some part of it to house its executive or administrative offices, or those of its subsidiaries, then the Board will generally assume jurisdiction and declare that the operations of the building will affect commerce. The amount of yearly rentals paid by out-of-state tenants who use the building, however, will not be considered to be a determinative factor by the Board nor will it have bearing upon the decision to take or refuse to take jurisdiction, particularly since the operation of an office building housing a variety of tenants is, in general, a matter of local consequence not covered by the provisions of the National Labor Relations Act.

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[21] Local illustrations may be found in the Chicago Furniture Mart and, possibly, the Chicago Merchandise Mart.