

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of	:	
UPHOLSTERERS' INTERNATIONAL UNION	:	Case I
LOCAL 29	:	No. 17150
Involving Certain Employes of	:	E-2813 R-5545
PRADE UPHOLSTERY INC.	:	Decision No. 12309
	:	

Appearances:

Mr. Fred Wagner, Business Representative, appearing on behalf of the Union.
 Davis, Kuelthau, Vergeront, Stover & Leichtfuss, Attorneys at Law,
 by Mr. Clifford B. Buelow, appearing on behalf of the Employer.

ORDER OF DISMISSAL

Petition having been filed with the Wisconsin Employment Relations Commission by Upholsterers' International Union Local 29, requesting that an election and a referendum be conducted, pursuant to Sections 111.05 and 111.06 of the Wisconsin Employment Peace Act, among all production and maintenance employes of Prade Upholstery Inc., but excluding office and clerical and all other employes; and hearing on the matter having been conducted at Milwaukee, Wisconsin, on October 18, 1973, Hearing Officer Marshall L. Gratz being present; and during the course of said hearing, the above named Employer having moved that the petition be dismissed for the reason that the Commission is without jurisdiction of the matter; and following the hearing, Counsel for the Employer having filed a Memorandum Brief with supporting Affidavit, and the Union, upon reasonable notice, having raised no objection to the receipt into evidence of the contents of said Affidavit; and the Commission having considered the evidence and arguments adduced at the hearing and the Brief submitted by the Employer; and the Commission being in doubt as to whether it has jurisdiction to determine the question of representation raised in the instant petition;

NOW, THEREFORE, it is

ORDERED

That the election and referendum petition filed herein be, and the same hereby is, dismissed, without prejudice to the filing of a new petition in the event that the National Labor Relations Board should refuse to execute its jurisdiction with respect to the question of representation existing between the parties.

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of December, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slawney
 Morris Slawney, Chairman

Zel S. Rice II
 Zel S. Rice II, Commissioner

Howard S. Bellman
 Howard S. Bellman, Commissioner

MEMORANDUM ACCOMPANYING ORDER OF DISMISSAL

The evidence adduced at the hearing established that the Employer is engaged in the reupholstering of furniture exclusively for "private customers" and that during calendar year 1972, the Employer had a gross volume of sales of \$244,367 and an expenditure on raw materials (cotton, foam, twine, fabric covers, nails and the like) of \$71,834, of which \$57,500 worth was received directly from out-of-state suppliers.

Based upon those facts, the Employer took the position that the Employer constitutes a "nonretail" enterprise within the meaning of the jurisdictional standards applied by the National Labor Relations Board (NLRB); and that since the Employer's direct inflow of goods from out-of-state suppliers exceeded \$50,000 in 1972, the NLRB would exercise jurisdiction over the subject matter of the petition, thus pre-empting any exercise of jurisdiction with respect thereto by the Commission.

The Union argued that the Employer's business was retail in nature by reason of the fact that the Employer's customers were not engaged in reselling the upholstered furniture to third parties; that the Employer's gross volume of sales does not exceed the \$500,000 level required by the NLRB; and that the Commission, therefore, has jurisdiction of the matter.

Following the close of the hearing, the Hearing Officer notified both parties, in writing, that they had the opportunity to submit written statements concerning the issue of "Whether Prade Upholstery Inc. should be deemed a 'retail' or 'nonretail' establishment for the purposes of application of NLRB jurisdictional guidelines." Only the Employer filed such a statement, which consisted of a Memorandum Brief with supporting Affidavit by its President.

The Union was served with a copy of the Affidavit and of the Brief and has raised no objection to the Commission's consideration of the contents thereof.

The Affidavit, in pertinent part, reads as follows:

"Slightly more than ninety-five (95) percent of Prade Upholstery's sales are made to purchasers who desire to satisfy their personal needs and who are ultimate consumers of the products purchased, and that the remaining sales are made to public or private institutions and industrial, commercial and professional users, who do not purchase to satisfy their own personal needs."

The Commission finds it unnecessary to determine whether the Affidavit ought to be given consideration for reasons stated below.

In its Memorandum Brief, the Employer argues that the NLRB would apply its nonretail jurisdictional standard to the instant Employer's business and therefore exercise its jurisdiction because:

1. "Retail" refers to enterprises which sell or service products for ultimate consumers, i.e., a purchaser who desires ". . . to satisfy his own personal wants or those of his family or friends" -- citing J. S. Latta & Son, 114 NLRB No. 192, 37 LRRM 1140 (1955) and Roland Electrical Company v. Walling, 326 U.S. 657 (1947).

2. Since (in view of the Affidavit) the Employer's customers are partly retail and partly nonretail, and since the Employer is a single integrated enterprise, whose operations entail retail sales aspects, as well as certain aspects of a nonretail manufacturing enterprise (competition for supplies of raw materials and for skills used in manufacturing and material handling unlike the skills ordinarily used in retail pursuits) the NLRB would exercise its jurisdiction with respect to the Employer if it met either the retail or the nonretail jurisdictional amount standard -- citing Man Products, Inc., 128 NLRB 546, 46 LRRM 1353 (1960).

3. The Employer's business satisfies nonretail standard, and therefore the NLRB, and not the Commission, has jurisdiction to determine the question of representation.

DISCUSSION:

The NLRB's current standard for asserting jurisdiction over retail enterprises within its statutory jurisdiction is a gross volume of business of at least \$500,000 per annum. 1/ The Employer clearly would not fall within the coverage of that standard.

The Board's current standard for asserting jurisdiction over non-retail enterprises within its statutory jurisdiction is a minimum of \$50,000 annual inflow (out-of-state purchases) or a minimum of \$50,000 annual outflow (out-of-state sales). 2/ If that standard were applicable to the Employer, the NLRB would, in all probability, exercise jurisdiction over the instant question of representation, pre-empting the Commission from doing so.

The NLRB also has a well-established rule that its jurisdiction over combined retail-nonretail enterprises would be asserted if either the retail or the nonretail standard is satisfied. 3/ That rule has been applied in two different types of cases. There are sufficient similarities between the instant situation and each of those types of cases to raise significant doubts as to whether the Board would refuse to exercise its jurisdiction over the instant matter.

The rationale in the first type of case applying the above rule is most clearly set forth in the Man Products case itself. In that case, the employer manufactured cellar doors and prefabricated garden sheds and sold same to customers, 99 percent 4/ of whom were retail. 5/ Its gross sales did not meet the retail guidelines, but its direct inflow and outflow each exceeded \$50,000. The Board exercised jurisdiction, reasoning as follows:

1/ Carolina Supplies & Cement Co., 122 NLRB 88, 43 LRRM 1060 (1958).

2/ Siemons Mailing Service, 122 NLRB 81, 43 LRRM 1056 (1958).

3/ Man Products, Inc., above; Indiana Bottled Gas Co., 128 NLRB 1441, 46 LRRM 1476 (1960).

4/ This figure is inaccurately set forth in the unofficial reporter as "90%". Compare, 128 NLRB 546 with 46 LRRM 1353.

5/ I.E., buying for personal consumption rather than for profit. See generally, J. S. Latta & Son and Roland Electrical Company v. Walling cited above.

"It is apparent that the Employer's business is a single, completely integrated enterprise, encompassing both the manufacture of its products and their sale, in large measure, to the ultimate consumers without the intervention of a wholesaler. In dealing with its jurisdictional problems, the Board has found it advisable not to exercise its jurisdiction to the fullest extent and, consistent with that policy, has adopted limited jurisdictional standards for various phases of business activity. Thus it established jurisdictional standards for clearly retail enterprises . . . , enterprises other than retail, . . . and combinations of both"

"The Board, however, has not had occasion to define its jurisdictional policy in situations such as presented in the instant case where an employer's operations do not fall into any given pattern of business activity. It is clear, of course, that the Employer's business has an aspect of a retail enterprise because it sells to the ultimate non-business consumer. But it is also clear that in all other respects its activity possesses elements of a nonretail manufacturing enterprise, concerned with its sources of supply of raw material, its recruitment of employees with skills required in manufacturing or in handling material other than at a purely retail level, and its competition for such skills with other nonretail enterprises in the labor market. In such situations, the Employer's activities also offer considerations for the assertion of jurisdiction on the basis of the Board's nonretail standards. Certainly, we do not find here the same problems which concerned the Board and resulted in the establishment of an exclusive gross volume test for retail enterprises^{6/} At least no persuasive reason is presented why the assertion of jurisdiction over the Employer's type of business should be gauged by its retail activity alone. We have, therefore, decided that in cases involving enterprises which constitute a single integrated business, the Board will assert jurisdiction if the employer's operations meet either its retail or nonretail standards."^{7/}

Although the instant Employer does not manufacture furniture "from scratch," his operation is, nevertheless, in many respects similar to that in Man Products. He purchases substantial amounts of raw (as opposed to finished) materials and enters the labor market for employes' skills that are much more related to manufacturing and raw material handling

^{6/} Those concerns were that jurisdictional determinations of inflow or outflow amounts for retail enterprises tended to involve inflow determinations which were costly to the Board and the Employer since they usually required extensive examination of the records of a myriad of transactions in order to trace the source of various items stocked by the retailer; "gross volume of business" figures were considered by the Board to be easier to deal with and were, for that reason, selected as the exclusive retail test. See, Carolina Supplies & Cement Co., 122 NLRB 88, 43 LRRM 1060 (1958).

^{7/} 128 NLRB 546, 46 LRRM 1353-4 (1960). See also, Burnett Construction Co., 149 NLRB 1419, 1420 (1964) (Cement distributor found to be ". . . more than a retail enterprise" by reason of the fact that he manufactured redi-mix from component ingredients and delivered same to both retail and nonretail consumers.)

than they are to retail activities in the traditional sense of the term. For those reasons, and because Man Products has often and uniformly been cited with favor in subsequent Board decisions, significant doubts are raised as to whether the NLRB would refuse to exercise its jurisdiction in the instant matter.

In a second set of cases, the NLRB has asserted jurisdiction over employers engaged in a combination of retail and nonretail sales where such employees have met either the retail or nonretail jurisdictional standards based on the totality of their business. ^{8/} Thus, if the Commission were to find evidence in the record that the Employer's sales are similarly mixed ^{9/} -- i.e., if the Commission were to consider the Affidavit as a part of the instant record and give weight to same -- additional doubt would be raised as to whether the Commission has jurisdiction of the subject matter of the petition. However, since the aforementioned doubts raised by the nonretail aspects of the Employer's activities in the markets for labor and raw materials are sufficient to support the Order herein, the Commission finds it unnecessary to determine whether the record should be reopened for receipt into evidence of the Employer's Affidavit.

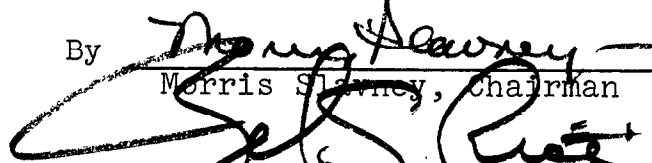
Instead, based upon the doubts discussed earlier, the Commission has ordered that the instant petition be dismissed without prejudice to the filing of another such petition in the event that the National Labor Relations Board expressly refuses to exercise its jurisdiction with respect to the question of representation set forth in the instant petition.

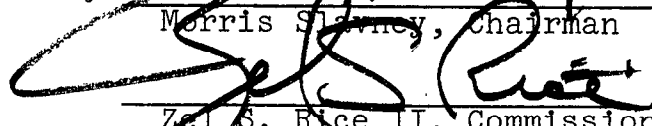
Regarding the referendum requested by the instant petition, the Commission is likewise dismissing without prejudice because such request is not appropriate in view of the undetermined nature of the other aspects of the matter.

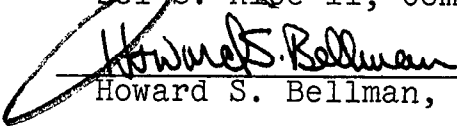
Dated at Madison, Wisconsin, this 5th day of December, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slawney, Chairman


Zel S. Rice II, Commissioner


Howard S. Bellman, Commissioner

^{8/} See, e.g., Indiana Bottled Gas Co., above (wholesale and retail distribution of gases and liquid petroleum); Wash Well No. 2, Inc., 139 NLRB 417, 51 LRRM 1316 (1962) (laundry and dry cleaning services performed for individual consumers and for motels -- i.e., nonretail consumers, as well.)

^{9/} While it is possible that the "less than five percent nonretail sales" of the instant Employer is de minimis, the decisions following the 1960 Man Products and Indiana Bottled Gas cases have neither enunciated a de minimis rule nor given any express consideration to the proportionate mix of retail versus nonretail sales involved. See, e.g., Chicago Federation of Musicians, Local 10, 153 NLRB 68, 76, 59 LRRM 1388 (1965) (Board's only express finding was that ". . . at least some . . ." of the musician's services were performed for purchasers other than the ultimate consumers of his performance.); but cf., Appliance Supply Co., 127 NLRB 319, 46 LRRM 1020 (1960) (de minimis rule applied under pre-1960 Board standard in "mixed sales" cases.) As noted above, the Man Products case involved only about 1 percent nonretail sales, but the rationale therein was not based upon the Employer's mixed sales.