

In the Matter of BETHLEHEM-FAIRFIELD SHIPYARD, INCORPORATED AND
M & M RESTAURANT OPERATING COMPANY, INC. and CONGRESS OF
INDUSTRIAL ORGANIZATIONS

Case No. 5-R-1373.—Decided December 20, 1943

Mr. David H. Werther, for the Board.

Mr. John L. Wynne, of Bethlehem, Pa., for Bethlehem.

Mr. Everett B. Lackie, of Baltimore, Md., for M & M.

Mr. Frank J. Bender, of Baltimore, Md., for the C. I. O.

Mr. Joseph A. Padway, by *Mr. James A. Glenn*, of Washington, D. C., *Mr. Bertram H. Ross*, of Philadelphia, Pa., and *Mr. Anthony Glorioso*, of Baltimore, Md., for Local 695.

Miss Melvern R. Krelow, of counsel to the Board.

DECISION
AND
DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon petition duly filed by Congress of Industrial Organizations, herein called the C. I. O., alleging that a question affecting commerce had arisen concerning the representation of employees of Bethlehem-Fairfield Shipyards, Incorporated and M & M Restaurant Operating Company, Inc., Baltimore, Maryland, herein called Bethlehem and M & M, respectively, the National Labor Relations Board provided for an appropriate hearing upon due notice before Bernard Cushman, Trial Examiner. Said hearing was held at Baltimore, Maryland, on October 26, 27, 28, and 29, 1943, Bethlehem, M & M, the C. I. O., and Hotel & Restaurant Employees International Alliance and Bartenders International League of America, Local #695, herein called Local 695, appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. At the commencement of the hearing, Local 695 made a motion to dismiss the petition on the grounds that (1) the Board had no jurisdiction in the matter; (2) a collective bargaining contract between M & M and United Soap and Glycerine Workers Fed-

eral Labor Union, Local 20983 A. F. of L., herein called the Soap Workers, subsequently assigned to Local 695, constituted a bar to a determination of representatives, and (3) that the unit requested in the petition is inappropriate. A similar motion was made by M & M. Bethlehem moved that the petition be dismissed on the ground that Bethlehem is not an employer within the meaning of the National Labor Relations Act, and that the employees involved within the scope of the petition are not subject to the jurisdiction of the Board. The Trial Examiner reserved rulings on the motions for the Board. For reasons hereinafter set forth the motions are hereby denied. All parties were afforded opportunity to file briefs with the Board.

On November 30, 1943, a stipulation to correct the transcript of record, entered into between the parties on November 29, 1943, was filed with the Board. The stipulation is hereby made a part of the record.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANIES

Bethlehem-Fairfield Shipyard, Incorporated, a Maryland corporation, operates a shipyard at Fairfield, Baltimore, Maryland, where it is engaged in the construction of merchant vessels. All the shipbuilding facilities are owned by, and all the vessels are being constructed on a cost plus basis for the United States Maritime Commission. During 1942, approximately 90 percent of all materials used at the shipyard was furnished by the Commission, and 50 percent of all materials used was shipped to the shipyard from points outside the State of Maryland. During the same period more than 75 Liberty ships were constructed by Bethlehem and delivered to the Commission.

M & M Restaurant Operating Company, Inc., a Maryland corporation, is engaged in the operation of cafeterias, canteens, and kitchens in defense plants located in and around Baltimore, Maryland, where it prepares, serves, and sells food and related products. Under the terms of a contract hereinafter discussed, M & M operates cafeterias and canteens at the Fairfield yard of Bethlehem. Foodstuffs and related products in the sum of approximately \$900,000 are purchased annually by M & M for use in the cafeteria and canteens operated by M & M at the Fairfield yard and are shipped to such cafeteria and canteens from warehouses of distributors located within the State of Maryland. A substantial amount of such foodstuffs are shipped to said warehouses from points outside the State of Maryland. Approximately 1½ percent of the total purchases by M & M are made from points outside the State of Maryland. The gross volume of sales by

all cafeterias and canteens operated by M & M is approximately \$2,000,000 per year.¹ Approximately 65 percent of the persons employed by Bethlehem in the Fairfield yard patronize and eat in the cafeteria and canteens at the Fairfield yard. The remaining 35 percent of employees of Bethlehem bring their own food from home for consumption on the premises.

On June 1, 1943, Bethlehem and M & M entered into a contract in which M & M "as an independent contractor" received the exclusive right and privilege to sell foodstuff in the cafeteria and canteen buildings provided by Bethlehem. Bethlehem agreed to pay all real estate and personal property taxes on the facilities and equipment and to maintain said facilities (but not the equipment) in reasonable repair; to furnish telephone lines, facilities for heat and electricity, gas and water, plumbing and sanitary facilities, and to maintain same without expense to M & M. Bethlehem agreed to reimburse M & M for any losses suffered by M & M in the operation of the cafeteria and canteens.² M & M agreed "to dismiss from its employ any person or persons whom the Contractor [Bethlehem] in writing states is unsatisfactory to the Contractor, and to pay such salaries which are not less than, or in conflict with such scale of wages or salaries as may be established by the Contractor," all salaries and wages being subject to approval in writing by Bethlehem. M & M agreed to serve food during such hours of the day as Bethlehem should designate. M & M agreed to furnish Bethlehem with a complete statement of operations within 15 days after the close of each calendar month; to pay Bethlehem within 15 days after the expiration of each term of 6 months an amount equal to 5 percent of the gross receipts for the said 6-month period, this obligation on the part of M & M not to arise until M & M had first received 2½ percent of the gross receipts for the 6-month period.³ In the event M & M should file a petition in bankruptcy, or if in the opinion of Bethlehem or the United States Maritime Commission any other event should occur which "might impair the ability of the Operator [M & M] to perform its obligations under this subcontract to the satisfaction of the Contractor [Bethlehem] and of the Commission," Bethlehem might terminate the contract without notice.

It is clear that the M & M is the employer of the employees involved herein; they are listed on M & M's pay roll and are paid and supervised by M & M, which also pays social security taxes, unemployment com-

¹ M & M also operates cafeterias and canteens at plants in Baltimore operated by other companies under separate contracts for each.

² There was a previous contract executed by Bethlehem and M & M on October 23, 1941, which was terminated in May of 1943. Under such contract, M & M has been reimbursed by Bethlehem for losses suffered by M & M prior to the execution of the present contract.

³ No rent or other consideration is received by Bethlehem for permitting the use of the cafeteria and canteen buildings; rather, Bethlehem exercises the prerogatives and incurs the risks of ownership management by sharing in the profits, and by underwriting M & M for any operating losses suffered by it.

pensation taxes, and workmen's compensation insurance premiums for such employees. There remains the question, however, as to whether Bethlehem is also the employer of such employees. There is testimony in the record that M & M's operation and supervision of the cafeteria and canteens and the persons employed therein are, in practice, not controlled or supervised by Bethlehem, in that M & M has not consulted Bethlehem with reference to the hire, discharge, or transfer of such employees; Bethlehem has not exercised its right to require the discharge of employees; no scale of wages has ever been submitted by M & M to Bethlehem, and the prices of meals have not been set by Bethlehem. However, we do not believe that this testimony, taken at its face value, changes the situation in any important respect. We have already referred to provisions in the contract which give Bethlehem complete control over the supervision and operation of the cafeteria and canteens. That Bethlehem's power of control may not in fact have been exercised is immaterial, since the right to control rather than the actual exercise of that right is the touchstone of the employer-employee relationship. We find that Bethlehem is also the employer within Section 2 (2) of the Act of the employees involved herein.⁴

II. THE ORGANIZATIONS INVOLVED

Congress of Industrial Organizations is a labor organization, admitting to membership employees of Bethlehem and M & M.

Hotel & Restaurant Employees International Alliance and Bartenders International League of America, Local #695, is a labor organization affiliated with the American Federation of Labor, admitting to membership employees of Bethlehem and M & M.

III. THE QUESTION CONCERNING REPRESENTATION

On June 2, 1943, the C. I. O. notified M & M by letter that it represented a majority of the employees of M & M and requested a collective bargaining conference. M & M has refused to recognize the C. I. O. until the C. I. O. is certified by the Board. At the hearing counsel for Bethlehem stated that Bethlehem likewise would not recognize the C. I. O.

On September 19, 1942, M & M and the Soap Workers entered into a contract providing, *inter alia*, for recognition of the Soap Workers "as the sole and exclusive bargaining agency for all employees who are eligible for union membership." The contract provides for a union shop and states that "the terms, provisions of this agreement shall become effective as of September 19, 1942, and continues in force until September 19, 1943, and thereafter unless thirty (30)

⁴ See *Matter of Sierra Madre-Lamanda Citrus Association*, 23 N. L. R. B. 143.

days' written notice is given by either party that changes, amendments or termination is desired." Both M & M and Local 695 contend that this contract constitutes a bar to a determination of representatives. Neither party has served upon the other a notice of desire to cancel the contract, and Local 695 maintains that the contract automatically renewed itself for a year on August 19, 1943. Inasmuch as the original term of the contract has expired and the contract is now terminable at any time upon 30 days' written notice, we find that the contract is no bar to this proceeding.⁵

A statement of the Regional Director, introduced in evidence at the hearing, indicates that the C. I. O. represents a substantial number of employees in the unit it claims to be appropriate.⁶

We find that a question affecting commerce has arisen concerning the representation of employees of the Company, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. THE APPROPRIATE UNIT

The C. I. O. contends that the appropriate unit should consist of all employees employed in the cafeteria and canteens located in Fairfield Yard of Bethlehem who are engaged in preparing, handling, and serving food, including cooks, chefs, bakers, dishwashers, bus employees, kitchen help, waiters, cashiers and assistant cashiers, truck drivers and their helpers, but excluding inspectors, all clerical employees, managers, assistant managers, chief chefs, and all other supervisory employees.⁷ M & M and Local 695 contend that the appropriate unit is one which consists of all employees of M & M at whatever plants these employees may be located. Bethlehem takes no position with respect to either contention.

Prior to September 19, 1942, M & M had no bargaining relationship with any labor organization. On May 19, 1943, D. McKaye and Alfred L. Mathias, President and Vice President, respectively, of M & M, and the Vice President of Hotel and Restaurant Employees' International Alliance, had a conference which resulted in an under-

⁵ M & M and Local 695 contend that this contract was intended by them to cover all employees of M & M wherever they may be located. The evidence shows, however, as contended by the C. I. O., that the contract never covered employees working in the cafeteria and canteens at Bethlehem, but was intended to apply only to the employees at Lever Brothers, Baltimore, Maryland. Such evidence is discussed hereinafter under Section IV.

⁶ The Regional Director reported that the C. I. O. presented 576 application cards, 524 dated between April and October 1943, 52 undated, bearing apparently genuine signatures. Of the 576 cards submitted, 228 bear the names of persons whose names appear on the Company's pay roll for the week ending August 30, 1943, which contained the names of 514 persons in the alleged appropriate unit.

Local 695 presented no evidence but relied upon its contract.

⁷ There are no bakers, waiters, inspectors, assistant cashiers or assistant managers now employed at the Fairfield Yard.

standing⁸ that M & M would recognize Local 695 as the sole collective bargaining agent for all employees employed by M & M at the Fairfield Yard, and that M & M would extend the same relationship to other plants where cafeterias were operated. It was further understood that no obligation would exist until the above understanding received the approval of the general president of the International. It appears that no contract was ever executed, and so far as the record discloses no approval was given by the general president.

Local 695 contends, as stated above, that the contract executed between M & M and the Soap Workers on September 19, 1942, which was assigned to Local 695 on June 3, 1943, covers the employees at Bethlehem. However, there is no evidence that the contract was ever applied to any plant other than that of Lever Brothers. Edward C. Hall, an employee of Lever Brothers, and a former member of the executive board of the Soap Workers, testified that the contract was to be confined in its application to employees of Lever Brothers' cafeteria; that discussions during negotiations were limited to such employees; and that the Soap Workers had never discussed wages and hours or working conditions with reference to employees working in the cafeteria and canteens at Bethlehem. Mathias testified that the contract was intended to apply at the outset only to the Lever Brothers' cafeteria employees, and that during negotiations it was "probably mentioned" that "we would try this and see how it worked and if it did we could extend our operations." Further evidence that it was not the intent of the Soap Workers and M & M to include Bethlehem in this contract is the fact that, so far as the record shows, neither the union-shop provision nor any of the other provisions of the contract were enforced with regard to the Bethlehem employees. Furthermore, the record fails to show that either the Soap Workers or Local 695 ever held a meeting of the Bethlehem employees, that they ever presented evidence of membership among such employees to M & M,⁹ or that the Bethlehem employees were ever afforded an opportunity to select either the Soap Workers or Local 695 as their representative. In view of the foregoing, we are impelled to conclude that both the contract of September 19, 1942, and the entire bargaining history prior to the claims of representation made by the C. I. O. on June 2, 1943, did not include employees at the Fairfield Yard, and that such employees have not been represented by, and have had no opportunity to freely choose, a collective bargaining representative.¹⁰

⁸ This understanding was embodied in a letter from the International Vice-President to McKaye and Mathias. Neither Local 695 nor M & M contend that this letter constitutes a contract.

⁹ While Local 695 contends that it has representation among the employees of the Fairfield Yard, when requested to produce evidence of such membership at the hearing, failed to do so.

¹⁰ See *Matter of Demuth Glass Works, Inc.*, 53 N. L. R. B. 451.

Although there is evidence of employee transfers between the cafeterias at the Fairfield Yard and other cafeterias operated by M & M, and some evidence that operations throughout all the cafeterias are uniform, it is apparent that the operations conducted by M & M at the Fairfield Yard are independent of those conducted elsewhere by M & M, as evidenced by the fact that they are, as found above, conducted as a joint enterprise under M & M's contract with Bethlehem, which contract is separate and distinct from those entered into between M & M and other companies serviced by it. In view of the foregoing, and in the absence, as stated above, of any bargaining history relating to the Bethlehem cafeteria and canteen employees, we conclude that a unit limited to such employees in the Fairfield Yard is appropriate.

The parties are in general agreement with respect to the inclusion and exclusion of the specific categories of employees in the unit hereinabove found appropriate. There is some dispute, however, with respect to the following classifications:

Chefs: The C. I. O. would include all chefs; Local 695 would exclude only those chefs who do no actual cooking and spend all of their time in supervision; M & M's position is not clear. There is a head chef who has the right to hire and discharge; and three other chefs, who in addition to engaging in various culinary duties similar to those of ordinary cooks, direct the cooks in the performance of their duties, and have the authority to recommend hire and discharge. We conclude that all of the chefs are supervisory, and we shall exclude them from the unit.

Managers: The C. I. O. and M & M would exclude all managers. Local 695 would exclude only those having authority to hire and discharge. There is one field manager who has the right to hire and discharge and is in complete control of the cafeteria and canteens. There are about 40 other managers who are in charge of the various canteens who have the authority to recommend hire and discharge and whose recommendations are generally followed. We find that these employees are supervisory, and we shall, accordingly, exclude them from the unit.

Cashiers: The C. I. O. and Local 695 desire the inclusion of cashiers. M & M would exclude them. Their duties are those ordinarily performed by cashiers. Since their duties are largely clerical and not directly connected with the preparation and serving of food, we shall exclude them.²¹

Timekeepers: The C. I. O. and M & M would exclude these employees, and Local 695 would include them. Their duties are entirely clerical, and we shall, therefore, exclude them from the unit.

²¹ See *Matter of S. & W. Cafeteria of Washington, Incorporated*, 20 N. L. R. B. 259; *Matter of The Welfare Association*, 45 N. L. R. B. 285.

Steward in the storeroom: The C. I. O. and Local 695 desire his inclusion; M & M desires his exclusion. He is engaged in checking food, keeping records, and handing out supplies on requisitions to the various canteens. He directs other employees in the storeroom, and may recommend hire and discharge. We find that he is a supervisory employee; we shall exclude him from the unit.

We find that all employees of Bethlehem and M & M in the cafeteria and canteens located in the Fairfield Yard, who are engaged in preparing, handling, and serving food, including cooks, dishwashers, bus employees, kitchen help, truck drivers and their helpers, but excluding cashiers, timekeepers, clerical employees, chefs, managers, the steward in the storeroom, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

V. THE DETERMINATION OF REPRESENTATIVES

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed during the pay-roll period immediately preceding the date of our Direction of Election, subject to the limitations and additions set forth therein.

DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 3, it is hereby

DIRECTED that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with Bethlehem-Fairfield Shipyards, Incorporated, and M & M Restaurant Operating Company, Inc., Baltimore, Maryland, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Fifth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Sections 10 and 11, of said Rules and Regulations, among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces

of the United States who present themselves in person at the polls, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, to determine whether they desire to be represented by Congress of Industrial Organizations, or by Hotel & Restaurant Employees International Alliance and Bartenders International League of America, Local #695, for the purposes of collective bargaining, or by neither.

MR. GERARD D. REILLY took no part in the consideration of the above Decision and Direction of Election.