

In the Matter of BETHLEHEM TRANSPORTATION CORPORATION and NA-  
TIONAL MARITIME UNION OF AMERICA

*Case No. 8-C-1693.—Decided May 11, 1945*

DECISION

AND

ORDER

On December 29, 1944, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed. Thereafter, National Maritime Union of America and counsel for the Board filed exceptions to the Intermediate Report and briefs in support of their exceptions; and the respondent filed a brief. Oral argument was held before the Board at Washington, D. C., on May 1, 1945, and was participated in by counsel for the respondent and counsel for the National Maritime Union of America.

The Board has reviewed the rulings of the Trial Examiner made at the hearing, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the complaint herein against Bethlehem Transportation Corporation, Cleveland, Ohio, be, and it hereby is, dismissed.

MR. JOHN M. HOUSTON took no part in the consideration of the above Decision and Order.

INTERMEDIATE REPORT

*Mr. Frank L. Danello, for the Board*  
*Cravath, Swame and Moore, by Mr. John H. Morse, of New York City, for*  
the respondent.

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*Mr. William L. Standard, by Mr. Herman Rosenfeld, of New York City, and Mr. Frank Jones, of Cleveland, Ohio, for the Union.*

STATEMENT OF THE CASE

Upon a charge duly filed on August 9, 1944, by National Maritime Union of America, herein called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Eighth Region (Cleveland, Ohio), issued its complaint dated November 13, 1944, against Bethlehem Transportation Corporation, herein called the respondent, alleging that the respondent had engaged in, and was engaging in unfair labor practices within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint and notice of hearing thereon were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance that: (1) on or about November 13, 1943, and on or about May 18, 1944, and at all times thereafter, the respondent refused and continues to refuse to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit consisting of the unlicensed personnel on all the steamships operated by the respondent on the Great Lakes, although the Union since November 13, 1943, has been the exclusive representative of all the employees in said unit; and (2) by said act, the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

On November 28, 1944, the respondent filed its answer wherein it denied that it had refused to bargain with the Union or that the Union represented a majority of the employees in or had requested the respondent to bargain within the unit alleged in the complaint, but it admitted the receipt from the Union of a letter dated November 4, 1943,<sup>1</sup> and a telegram<sup>2</sup> about May 18, 1944, copies of which it attached to the answer. The answer admitted that the respondent had informed the Union that it did not "feel that it would be warranted in dealing with the Union as the exclusive representative of the unlicensed personnel" on the two newly acquired steamships "unless and until" the Union was certified as such representative by the Board.

Pursuant to notice a hearing was held at Cleveland, Ohio, on November 30, 1944, before J. J. Fitzpatrick, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Union were

<sup>1</sup> The letter stated that the Union, as a result of a consent election held in 1941, had been and was the exclusive bargaining agent of all unlicensed personnel employed by the respondent on thirteen vessels it was then operating; that recently the respondent had come into possession of and was operating two new steamships, "the unlicensed employees of which do not as yet come within the bargaining unit." It suggested that the Union and the respondent agree to include the unlicensed personnel aboard the two additional vessels in the bargaining unit.

<sup>2</sup> The telegram is as follows:

BETHLEHEM TRANSPORTATION CORP  
2600 TERMINAL TOWER CLEVELAND

ON NOVEMBER THIRTEENTH LAST YEAR THE NATIONAL MARITIME UNION FILED PROOF OF MAJORITY REPRESENTATION AMONG UNLICENSED CREWS OF YOUR TWO NEW VESSELS STEELTON AND LEHIGH. WE REQUESTED THAT YOU AGREE TO INCLUSION OF THESE TWO VESSELS IN THE UNIT ESTABLISHED BY NLRB ELECTION IN NINETEEN FORTY ONE. WE AGAIN MAKE SUCH REQUEST FAILING TO HEAR FROM YOU IN REASONABLE LENGTH OF TIME MAY MAKE IT NECESSARY FOR UNION TO FILE CHARGE WITH NLRB FOR REFUSAL TO BARGAIN. WE HOPE THAT THIS STEP WILL NOT BE NECESSARY

FRANK JONES, AGENT NATIONAL MARITIME UNION.

represented by counsel. All participated in the hearing and were granted full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues. At the conclusion of the Board's case the respondent moved to dismiss the complaint for failure of proof. The motion was denied. At the conclusion of the hearing, the respondent again moved to dismiss the complaint on the grounds that no substantial evidence had been adduced to support the allegations in the complaint that (1) the unlicensed personnel employed on all the steamships operated by the respondent constituted an appropriate unit; (2) that the Union on November 13, 1943, had been designated by a majority of the employees in the alleged appropriate unit, and (3) that since November 13, 1943, the Union has been the representative of a majority of the employees within the alleged appropriate unit. The motion was taken under advisement. The motion to dismiss is now granted as will hereinafter appear. At the conclusion of the hearing Board's counsel moved to conform the pleadings to the proof in formal matters. The motion was granted over the objection of the respondent's counsel. All parties waived oral argument but were given until December 12, 1944, to file briefs with the undersigned. Briefs have been received from the respondent, Board's counsel, and the Union.

Upon the entire record thus made and from his observation of the witnesses, the undersigned makes the following:

#### FINDINGS OF FACT

##### I THE BUSINESS OF THE RESPONDENT

The respondent, the Bethlehem Transportation Corporation, is a Delaware corporation, engaged in the transportation of iron ore, coal, limestone, and grain in substantial quantities on the Great Lakes and connecting tributary waters where it operates 15 steamships.<sup>3</sup>

##### II THE ORGANIZATION INVOLVED

The National Maritime Union of America, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the respondent.

##### III THE ALLEGED UNFAIR LABOR PRACTICES

###### A *The alleged refusal to bargain*

###### 1. The issues

The complaint alleges in substance that the respondent on or about November 13, 1943, and on or about May 18, 1944, and at all times thereafter refused to bargain collectively with the Union as the exclusive bargaining representative of the unlicensed personnel employed on all the respondent's steamships.

The respondent's answer denies the appropriateness of the unit alleged in the complaint, and on information and belief denies that the Union represents a majority of the employees included therein. It alleges in effect that it will not deal with the Union as the exclusive representative of the unlicensed personnel employed on its two additional vessels, which the Union now seeks to include in the established unit, until the Union is certified by the Board as such representative.

<sup>3</sup> The above finding is based upon a stipulation of the parties.

## 2. Events giving rise to the issues

In the fall of 1941, the respondent was operating 13 vessels on the Great Lakes named as follows: *Bethlehem, Saucon, Lebanon, Lackawanna, Maryland, Lehigh, Cambria, Steelton, William H. Donner, Leonard C. Hanna, Powell Stackhouse, Daniel J. Morrell, and Edward Y. Townsend.*

On November 6th of that year the Union filed a petition for investigation and certification of representatives pursuant to Section 9 (c) of the Act wherein it alleged that the appropriate bargaining unit consisted of the unlicensed personnel employed by the respondent on the above-described vessels which were specifically named in the petition. On November 12, 1941, the respondent and the Union signed an agreement for a consent election wherein it was agreed that the appropriate unit should consist of the unlicensed personnel employed on the 13 named vessels. This agreement was approved by the Regional Director, who certified to the parties on December 16, 1941, following an election in said unit that the Union had been designated by a majority of the employees and that in accordance with the terms of the consent election agreement, the respondent had agreed to bargain with the Union as the exclusive representative of the employees in said described unit. Since the above certification the respondent has recognized and bargained with the Union as the exclusive representative of the employees in the agreed unit, although the record is not clear whether they operated under a contract up to the summer of 1943. However, at that time the Union and the respondent began negotiations relative to the terms of a written contract concerning the employees on the 13 named steamships. The negotiators could not agree on certain provisions and the dispute went to the War Labor Board, and pursuant to its Directive Order dated June 9, 1944, a contract was signed by the Union and the respondent on August 1, 1944, covering the unlicensed employees on the 13 steamships. This contract is effective to January 31, 1945, and from year to year thereafter unless notice be given by either party not less than 30 days prior to January 31, 1945, or January 31 of any year thereafter, of a desire to terminate, modify or amend the agreement.

In the meantime, in the fall of 1943, before this contract was signed and while negotiations were in progress, the respondent began the operation of two steamships turned over to it by the United States Maritime Commission. The new vessels were named the *Lehigh* and the *Steelton*.<sup>4</sup>

On November 4, 1943, Frank Jones, the Cleveland port agent for the Union, wrote the respondent the letter referred to in the respondent's answer<sup>5</sup> and suggested that the respondent and the Union agree to include the unlicensed personnel employed on the two additional vessels within the bargaining unit. Not hearing from the respondent relative to this suggestion, Jones again wrote to the respondent on November 13, 1943, as follows:

NOVEMBER 13, 1943.

BETHLEHEM TRANSPORTATION CORP.,

2600 Terminal Tower Bldg., Cleveland, Ohio

GENTLEMEN: On November 4th the undersigned sent you a letter requesting that the corporation and the Union jointly agree to include the two new vessels acquired by your company, and named the S. S. *Lehigh* and the S. S. *Steelton*, in the collective bargaining unit.

To date we have heard no word from you on this matter.

We have been designated the collective bargaining agent by the majority of the unlicensed personnel employed aboard the above named two vessels

<sup>4</sup> The old *Lehigh* and *Steelton*, operated by the respondent, had previously been renamed, respectively, the *Johnstown* and the *Cornwall*.

<sup>5</sup> See footnote 1, *supra*.

and in view of your choosing to ignore our letter on the subject we are accordingly filing a petition for certification with the National Labor Relations Board. You will undoubtedly hear from them shortly

The same day the Union filed a petition for investigation and certification of representatives wherein it alleged that the appropriate unit consisted of "all unlicensed personnel on the Company's vessels known as and named the steamships *Lehigh* and *Steelton*" The petition further recited: "The petitioning union is the recognized bargaining agent for all other vessels of the Company's Lake Fleet to the extent of 13 vessels There is at present a case before the National War Labor Board between the petitioning union and the Company for a contract covering all the vessels of the Company's fleet with the exception of these two vessels namely, S. S. *Lehigh* and S. S. *Steelton*, which were acquired by the Company after the case went to the War Labor Board." The petition also referred to the fact that in early November 1943, the Union had requested the respondent to include the unlicensed employees on the two additional vessels within the established bargaining unit but that the respondent had made no reply to the request.

In the hearing before the War Labor Board, which involved several Great Lakes transportation companies in addition to the respondent, the Union contended that it was common practice for the respondent, as well as the other companies involved, to operate the steamships as a fleet with no division either administratively or functionally among the vessels; that there was no valid reason why the respondent should not deal with the Union as the exclusive representative of the unlicensed personnel on all the 15 vessels and, in effect, asked the War Labor Board to so direct the respondent. On the other hand, the respondent argued that the unit had already been established by the National Labor Relations Board through the certification emanating from its Regional Office; that the War Labor Board did not have the authority to change the unit and that until and unless the National Labor Relations Board enlarged or changed the unit, the respondent would continue to deal with the Union as the exclusive representative only of the unlicensed employees on the 13 vessels. The War Labor Board refused to change the existing unit but directed the respondent to sign a contract with the Union covering the employees on the original 13 steamships As heretofore found such contract was executed as of August 1, 1944.

In the meanwhile in the spring of 1944, before the Directive Order of the War Labor Board had been issued, the Union secured permission from the Regional Director of the Board, to withdraw its petition for representation wherein it alleged that an appropriate unit would consist of the unlicensed employees of the two newly acquired boats, and about May 18, 1944, sent to the respondent the wire heretofore set forth<sup>6</sup> wherein it claimed the Union had "filed proof of majority representation" in the unlicensed employees of the 2 new vessels<sup>7</sup> and again requested that the respondent agree "to inclusion of the new vessels in the unit established by N. L. R. B. election in 1941", and suggested that a charge of refusal to bargain might be filed with the Board if the request was not granted. On May 29th, the respondent replied to this telegram by letter, stating that it had been advised by the Board that the Union had withdrawn its petition for certification as the exclusive representative of the unlicensed employees on the

<sup>6</sup> See footnote 2, *supra*.

<sup>7</sup> No showing of representation by the Union among the approximately 50 unlicensed employees on the 2 new steamships was made at the hearing. The Union relied on a cross-check of the unlicensed employees on the 13 vessels made in August 1944, by the Union and the respondent. The check showed that of a total of 352 unlicensed employees on those boats 221 were members of the Union.

two new vessels and that because of that fact, the respondent did not understand "upon what basis" the Union claimed to represent such unlicensed personnel. The letter concluded:

In any case, we do not feel that we should be warranted in dealing with such union as the exclusive collective bargaining representative of such unlicensed personnel unless and until it shall be duly certified as such by the National Labor Relations Board.

On August 9, 1944, the Union filed a charge that the respondent had refused to bargain with it as the representative of the unlicensed employees "aboard the S S *Lehigh* and the S S. *Steelton*". Having been advised of that fact, the respondent, on August 24th in a letter to the Regional Director reiterated its previous position relative to its willingness to deal with the Union as the exclusive bargaining representative in the Unit covering the unlicensed personnel on the 13 vessels pursuant to the 1941 agreement. The letter called attention to the Union's petition filed the previous fall alleging that the unlicensed personnel of the two new vessels constituted an appropriate unit, and the conferences between the Company and the Union and the Board representatives resulting therefrom wherein respondent explained that because of the short period remaining before the season closed, it would be impractical to arrange for the holding of an election in that unit before the fall lay-offs; and that the following spring the respondent had been notified by the Regional Office that the union petition had been withdrawn. On October 12, 1944, the respondent in response to an inquiry from a Regional Office Field Examiner wrote that it had no information as to whether or not the Union represented a majority of the unlicensed personnel employed on the two additional vessels, or that the Union was then claiming such majority; that under the circumstances, the respondent took no position as to whether the Union did or did not represent a majority of such employees; that the only existing appropriate unit was the one established by agreement in 1941 and approved by the Director; and that if the Union demonstrated in an election held under Board auspices that it represented a majority of the unlicensed personnel on the two new vessels the respondent was prepared and willing to include such employees in the existing unit.

#### Conclusions

It is obvious from the record in its entirety that the real issue in dispute is the question of an appropriate unit. The respondent is and has been bargaining with the Union as the exclusive representative of the employees in the established unit consisting of the unlicensed employees on the 13 named vessels. The position of counsel for the Board in effect is that an appropriate unit may consist of all unlicensed personnel employed on an entire fleet of vessels operated by such a company; that the 13 vessels named in the agreed unit made up the respondent's entire fleet of vessels in 1941; and that the respondent having since enlarged its fleet by the addition of 2 vessels it should be required to include the employees on the new boats in the unit and bargain on a fleet-wide basis. The respondent takes the position that the Board having in effect approved as appropriate the unit consisting of the employees on the original 13 vessels, it will not bargain with the Union in a fleet-wide unit until and unless in a representation proceeding the Board finds such larger unit appropriate and certifies the Union as the exclusive bargaining agency for the employees therein.

It is the opinion of the undersigned that in the circumstances as they appear in this case the respondent is entitled to have the issue of the appropriateness of a larger unit resolved by a representation proceeding before the Board. The

record will not sustain a finding that in 1941 the parties had in mind an expanding fleet-wide unit. When the respondent began operating the 2 additional vessels the Union admitted the unlicensed personnel thereon were not in the bargaining unit then established and sought to have the respondent agree to include them as part of the appropriate unit. Failing in this the Union filed a petition for investigation and certification of representatives alleging that the unlicensed employees on the two new boats constituted an appropriate unit. It later withdrew this petition and sought, also without success, to have the War Labor Board enlarge the original unit. Even the charge upon which the complaint herein is based does not allege that the respondent refused to bargain in a 15 vessel unit, but charges that it refused to bargain for the employees only aboard the 2 additional vessels.

It cannot be said that the respondent's position herein, which has been consistent throughout, reflects bad faith; or that it is a rejection of the principle of collective bargaining. Under the circumstances the respondent was not required to decide the issue of the unit at its peril. The Act provides the representation procedure for determination of the unit question. This procedure was available to the Union, but not to the respondent as there was no other union involved. The Union chose not to use the representation procedure. Until the appropriateness of the fleet-wide unit is resolved and established the respondent's refusal to recognize or deal with the Union as the exclusive representative of the employees in that unit does not constitute an unlawful refusal to bargain within the meaning of the Act. In view of the foregoing, it is unnecessary to make any determination in this Intermediate Report as to the appropriate bargaining unit or as to representation by the Union of a majority within such unit.<sup>8</sup>

It is therefore found that the respondent has not refused to bargain collectively with the Union as the exclusive representative of the unlicensed personnel on its present fleet of 15 vessels, and has not interfered with, restrained or coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.<sup>9</sup>

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

#### CONCLUSIONS OF LAW

1. The operations of the respondent, Bethlehem Transportation Corporation, Cleveland, Ohio, occur in commerce within the meaning of Section 2 (6) of the Act.

2. National Maritime Union of America is a labor organization within the meaning of Section 2 (5) of the Act.

<sup>8</sup> There is no question but what a fleet-wide unit would be found appropriate under numerous Board decisions and the August 1, 1944, check of union members on the 13 vessels referred to in footnote 7, *supra*, is probably adequate to show a fleet-wide majority as of that time because there were only 402 unlicensed employees aboard all 15 vessels. Waiving the question as to whether an overall majority in August is adequate to prove majority the previous May and November when the alleged refusal to bargain took place, such majority showing in no event discloses the desires of the employees particularly affected—the unlicensed employees aboard the *Lehigh* and the *Steelton*. Neither these ships nor the employees thereon were in contemplation when the unit was established in 1941. Where a new plant and new employees are involved, even where there is an existing contract and no dispute as to the unit, the Board requires the employees not in existence at the time the contract was executed to decide the issue as to their representation. (In re *Menasha Wooden Ware Corporation, etc.*, 48 N. L. R. B. 345. In re *The Prosperity Company, Inc.*, etc., 55 N. L. R. B. 350.)

<sup>9</sup> Cf. In re *Bonafide Mills, Inc.*, 38 N. L. R. B. 660. In re *Spicer Manufacturing Corporation, etc.*, 51 N. L. R. B. 679. In re *Kaiser Company, Inc.*, etc., 59 N. L. R. B. 547.

3. The respondent has not engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act.

#### RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the complaint against the respondent, Bethlehem Transportation Corporation, Cleveland, Ohio, be dismissed.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended, effective November 26, 1943, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

J J FITZPATRICK,  
*Trial Examiner.*

Dated December 29, 1944.