

In the Matter of MIDLAND STEAMSHIP LINE, INC. and NATIONAL  
MARITIME UNION OF AMERICA (CIO)

In the Matter of MIDLAND STEAMSHIP LINE, INC. and NATIONAL  
MARITIME UNION OF AMERICA (CIO)

*Cases Nos. 8-C-1811 and 8-R-1295, respectively.—*

*Decided March 15, 1946*

*Mr. George F. Hayes*, for the Board.

*Duncan, Leckie, McCreary, Schlitz & Hinslea*, of Cleveland, Ohio,  
by *Mr. Lucian Y. Ray*, for the respondent.

*Mr. Herman Rosenfeld*, of New York City, and *Mr. Frank Jones*,  
of Cleveland, Ohio, for the CIO.

*Miss Grace McEldowney*, of counsel to the Board.

## DECISION

AND

## ORDER

### STATEMENT OF THE CASE

Upon a charge duly filed by National Maritime Union of America (CIO), herein called the CIO, the National Labor Relations Board, herein called the Board, by its Regional Director for the Eighth Region (Cleveland, Ohio), issued its complaint, dated June 28, 1945, against Midland Steamship Line, Inc., herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, 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, accompanied by notice of hearing thereon, were duly served upon the respondent and the CIO.

With respect to the unfair labor practices, the complaint alleged in substance that the respondent, on or about October 19, 1944, and at all times thereafter, refused to bargain collectively with the CIO as the exclusive bargaining representative of the respondent's employees within an appropriate bargaining unit, although a majority of the employees in said unit, in a secret election conducted under the supervision of the Board on or about June 12, 1944, had designated

or selected the CIO as their representative for the purposes of collective bargaining.

The respondent thereafter filed its answer, in which it admitted, *inter alia*, that on October 17, 1944, the Board had certified the CIO as the bargaining representative of employees in an appropriate unit, and that on and after October 19, 1944, the respondent had refused to bargain collectively with the CIO as such representative, but denied that a majority of the employees in the unit had designated and selected the CIO as their collective bargaining representative and that the respondent had engaged in the unfair labor practices alleged in the complaint. It also made certain affirmative allegations with respect to the election which are hereinafter considered.

Pursuant to notice duly served upon the parties, a hearing was held on July 17, 1945, at Cleveland, Ohio, before Sidney Lindner, the Trial Examiner duly designated by the Chief Trial Examiner. At the hearing, the Board, the respondent, and the CIO were represented by counsel. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the close of the hearing, counsel for the respondent moved to dismiss the complaint on the ground that the Board's certification of the CIO as the collective bargaining representative of the respondent's unlicensed personnel was invalid. The Trial Examiner reserved his ruling upon this motion, which he thereafter denied in his Intermediate Report. During the course of the hearing, the Trial Examiner made rulings on other motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed.

Thereafter, the Trial Examiner issued his Intermediate Report, copies of which were served upon the respondent and the CIO. In the Intermediate Report, the Trial Examiner found that the respondent had engaged in and was engaging in unfair labor practices, within the meaning of Section 8 (1) and (5) of the Act, and recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Thereafter, the respondent filed exceptions to the Intermediate Report and a supporting brief.

Upon the request of the CIO, and pursuant to notice, the Board held a hearing for the purpose of oral argument at Washington, D. C., on January 10, 1946. The respondent and the CIO were represented by counsel and participated in the argument. Thereafter, pursuant to permission granted at the hearing, the respondent and the CIO filed supplemental briefs.

The Board has considered the exceptions and briefs filed by the respondent and the brief filed by the CIO and finds that the re-

spondent's exceptions, insofar as they are consistent with the findings, conclusions, and order set forth below, have merit.

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

## FINDINGS OF FACT

### I. THE BUSINESS OF THE RESPONDENT

Midland Steamship Line, Inc., is a Delaware corporation having its principal office and place of business in Cleveland, Ohio. It is engaged in the operation of bulk freight vessels on the Great Lakes carrying bulk freight such as coal, ore, and grain to various ports on the Great Lakes. The respondent admits that it is engaged in commerce within the meaning of the Act.

### II. THE ORGANIZATION INVOLVED

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

### III. THE UNFAIR LABOR PRACTICES

#### *A. Certification of the CIO*

On November 18, 1943, the Board, pursuant to a petition for investigation and certification of representatives filed by the CIO and hearing duly held thereon, issued its Decision and Direction of Election in *Matter of Midland Steamship Line, Inc.*, Case No. 8-R-1295,<sup>1</sup> in which it found that all unlicensed personnel, including stewards, on all the respondent's vessels constitute a unit appropriate for the purposes of collective bargaining. The Direction of Election, as subsequently amended,<sup>2</sup> provided for an election by secret ballot to be conducted among the employees within the appropriate unit, under the direction and supervision of the Regional Director of the Eighth Region, to determine whether they desired to be represented by the CIO or by Seafarers' International Union of America, Great Lakes District, AFL, herein called the AFL, for the purposes of collective bargaining, or by neither.

Pursuant to the Direction of Election, as amended, an election was held during the period from June 1 to 8, 1944, inclusive. Upon

<sup>1</sup> 53 N. L. R. B. 727.

<sup>2</sup> Amendments to the Direction of Election (unpublished) were issued by the Board on December 16, 1943, and May 5, 1944. On May 24, 1944, the Board issued a Third Amendment to Direction of Election (56 N. L. R. B. 839) which was subsequently corrected by an Order (unpublished) dated May 25, 1944.

the conclusion of the balloting, the Regional Director furnished to the respondent and the Unions a Tally of Ballots, which indicated that a majority of the 157 votes and challenged ballots had been cast for the CIO.<sup>3</sup>

On June 16 and 17, 1944, respectively, the respondent and the AFL filed objections to the election, in which they contended, among other things, that certain seamen who voted in the election were not employees of the respondent at the time when they cast their ballots. On July 15, 1944, the Regional Director issued his Report on Objections, recommending that the objections be overruled and the CIO certified in accordance with the Tally of Ballots. On July 20, 1944, the respondent and the AFL filed exceptions to the Regional Director's Report on Objections, and on August 17, 1944, the Board directed that the Regional Director issue a Supplemental Report on Objections to the Election. This report was issued on September 22, 1944. On September 27, 1944, and on October 2, 1944, the respondent and the AFL filed exceptions to said Supplemental Report. On October 17, 1944, the Board issued its Supplemental Decision and Certification of Representatives,<sup>4</sup> overruling the objections to the election and certifying the CIO as the exclusive representative of the employees in the appropriate unit for the purposes of collective bargaining. Thereafter, the respondent and the AFL filed motions with the Board to set aside its Supplemental Decision and Certification of Representatives, which motions were denied by the Board.<sup>5</sup>

### *B. The alleged refusal to bargain*

The parties have stipulated that on or about October 19 and 27, 1944, and on other occasions thereafter, the CIO requested the respondent to bargain collectively with it in respect to rates of pay, wages, hours of employment, and other conditions of employment, for all unlicensed personnel, including stewards, on all the respondent's vessels,<sup>6</sup> and that on each such occasion the respondent refused

<sup>3</sup> The results of the balloting, as set forth in the Tally of Ballots, were as follows:

Approximate number of eligible voters .....	165
Valid votes counted .....	153
Votes cast for National Maritime Union of America (CIO) ..	79
Votes cast for Seafarers' International Union of N. A., Great Lakes District (AFL) .....	31
Votes cast against participating unions .....	43
Challenged ballots .....	4
Void ballots .....	1

<sup>4</sup> 58 N. L. R. B. 1091.

<sup>5</sup> These motions were based upon substantially the same grounds that had previously been urged by the respondent and the AFL, and which had been considered by the Board in its Supplemental Decision and Certification of Representatives.

<sup>6</sup> The respondent admits, as the complaint alleges, that such employees constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act. As noted above, this is the unit found appropriate by the Board in Case No. 8-R-1295.

to do so. On June 20, 1945, the CIO filed its charge with the Board, alleging that the respondent had thereby violated Section 8 (1) and (5) of the Act.

*C. Contentions of the parties*

The respondent admits that it has refused, and is continuing to refuse, to bargain collectively with the CIO, but contends that its conduct is justified because five seamen who voted in the Board election, on the basis of which the CIO was certified, cast their ballots after their employment had terminated, and that the election and the Board's certification of the CIO were therefore invalid. This contention is based on the facts, among others, that each of the five seamen in question<sup>7</sup> performed his last work for the respondent on the day before he voted, and that immediately after voting he notified the captain of his ship that he was quitting, was then paid off as of the preceding day, and left his ship.<sup>8</sup>

At the hearing before the Trial Examiner and an oral argument before the Board, counsel for the respondent admitted that ordinarily when seamen remain on their vessel, even after the expiration of their shipping articles, their employment does not terminate, but

<sup>7</sup>Edward J. Conrady, Albert Leach, Swen Rodin, Stanley Seme, and Harry Gendelman.

<sup>8</sup>The facts regarding the five men, as stipulated by the parties, are as follows:

Respondent's Steamer Hazen Butler arrived at the Cleveland, Ohio, Breakwater at 12:07 A. M., June 2, 1944. She docked at 12:50 A. M., June 2, 1944 and the election was held immediately thereafter.

Edward J. Conrady, Albert Leach, Swen Rodin and Stanley Seme were employed on the Steamer Hazen Butler as members of her crew. Each of said persons had stood his last watch and completed his work on said vessel on June 1, 1944 and none of them stood a watch or did any work on said vessel on June 2, 1944. During the balloting, immediately after the arrival of the vessel, each cast his vote in said election. Immediately following the casting of their votes, each told the Captain of said vessel he was leaving the employment of the respondent and requested his money. The Captain of said vessel reports that he is certain that the above men did not tell him of their plans to leave the vessel until after they had voted.

The applicable pay roll of said vessel reveals that these men were paid off as of June 1, 1944, inasmuch as they did no work on said vessel on June 2, 1944. None of the parties to the election challenged the vote of any of the four individuals at the time of the balloting, and their names appeared on the Company's pay-roll voting list.

Respondent's Steamer J H Macoubrey arrived at the South Chicago Breakwater on June 8, 1944 at 2:51 A M. She was docked at the Norris Elevator at 4 20 A M June 8, 1944, and the election was held immediately thereafter.

Henry Gendelman was employed on the Steamer J H. Macoubrey as a member of her crew. On June 7, 1944 he advised the First Mate of said vessel that he intended to leave the respondent's employ upon the arrival of the vessel in South Chicago. Gendelman stood his last watch and completed his work on said vessel on June 7, 1944. When the vessel docked at 4 20 A M on June 8, 1944, Gendelman was asleep and, after being awakened, he voted and then requested his money. His vote was not challenged by any of the parties to the election at the time of the balloting, and his name appeared on the Company's pay-roll voting list. He was then paid off and, after packing his belongings, left the vessel. The pay roll of said vessel reveals that he was paid off as of June 7, 1944 inasmuch as he had stood his last watch and completed his work on that day.

continues under an implied agreement until new articles are signed.<sup>9</sup> He argued, however, that this relationship arises only if their employment is not terminated by reason of other circumstances, and that in the present case the termination is established by the fact that the men had stopped work before voting, that they were paid off as of the time when they stopped work, and that they intended to quit, as shown by the fact that they left the ship immediately after voting.<sup>10</sup>

Counsel for the CIO contended, on the other hand, that so long as a seaman remains on his ship, he is an employee, subject to the lawful orders of the master of the ship, and that whether or not he intends to quit does not affect his status.

#### *D. Conclusions*

In the Supplemental Decision and Certification of Representatives in Case No. 8-R-1295, the Board held that Conrady, Leach, Rodin, Seme, and Gendelman, as well as certain other seamen whose votes are not now in question, voted prior to the termination of the course of their employment and that their votes were therefore valid. The Trial Examiner, in his Intermediate Report, rejected the respondent's contention that the Board had erred in so finding; he therefore found, on the basis of the Board's certification, that on October 17, 1944, and at all times thereafter, the CIO had been, and that it still was, the exclusive representative of the employees in the appropriate unit, and that the respondent's refusal to bargain with the CIO as such representative was violative of Section 8 (1) and (5) of the Act. The holding in the Supplemental Decision and Certification that the five seamen in question were still in the course of their employment when they voted was based primarily on decisions of the Circuit Court of Appeals for the Second Circuit in *Sundberg v. Washington Fish & Oyster Co.*,<sup>11</sup> and *Wong Bar v. Suburban Petroleum Transport, Inc.*<sup>12</sup> On examination of these cases, we find, as the respondent points out in its brief, that in both the existence of the employer-employee relationship was assumed, and the only question was whether certain activities on the part of employees were within the scope or course of their employment. In the present case, the question is whether the employment relationship itself had terminated. For

<sup>9</sup> See *N L R. B v Waterman S S Corp.*, 309 U. S 206.

<sup>10</sup> Although he stated that the shipping articles are also a factor to be considered, he admitted, and counsel for the CIO agreed, that on the Great Lakes the articles do not play an important part in determining the duration of employment. The record shows that under the terms of the shipping articles, the term of service of Conrady, Leach, Rodin, and Seme ended when their ship reached port on June 2, 1944, but that Gendelman's term of service had not yet ended when he left his ship on June 8, 1944.

<sup>11</sup> 138 F. (2d) 801.

<sup>12</sup> 119 F. (2d) 745.

this reason, the rationale of the *Sundberg* and *Wong Bar* cases is not apposite to the situation before us. We have therefore reviewed the conclusions of the Board in the representation case in the light of the authorities cited in this case, and are of the opinion that insofar as Gendelman is concerned, the previous determination<sup>13</sup> that his employment had not terminated was erroneous.

It is conceded that Gendelman, on the day preceding the election, had stood his last watch and performed his last work for the respondent. So far as the record shows, he was free to leave the ship as soon as it docked on the morning of June 8. That such was the case is indicated by the fact that Gendelman, after being awakened upon the arrival of the vessel, requested and received his pay, packed his belongings, and left the vessel; apart from these acts, he took time only to vote in the election. Before the arrival of the vessel he had notified the first mate of his intention to quit as soon as the ship reached port. By so doing, he apparently had taken all possible steps in furtherance of his intention to quit. That he had not deviated from his expressed intention at the time of casting his ballot is manifest from his subsequent conduct. In these circumstances, it is unnecessary for us to determine whether an employee's mere intention to quit, not communicated to his employer, is sufficient to disqualify him from voting in an election conducted by the Board. In this instance it was so communicated to the first mate. Gendelman did no work thereafter.

At the oral argument before the Board, all parties in effect conceded that had this occurred in a plant on shore, the man's employment status would have terminated when he stopped work, and that he would not thereafter have been eligible to vote in a Board election, even though he had not yet received his pay. There is nothing in the record, nor have we been shown any authority, to satisfy us that the present case is so different as to require a different conclusion. In the circumstances of the case before us, we are satisfied and find that Gendelman had quit the respondent's employ before casting his ballot, and that his vote was therefore invalid.

Because a difference of one vote would place in question the CIO's majority, it is unnecessary for us to pass in detail upon whether the votes of the other four named seamen were also invalid. It appears, however, that the Trial Examiner was correct in holding that they were entitled to vote, the facts being different from those in Gendelman's case.

Since the record fails to show that a majority of the employees in the appropriate unit selected the CIO as their bargaining represen-

<sup>13</sup> Although neither of us participated in the Supplemental Decision and Certification, we should be inclined as a matter of administrative policy to regard that holding as "the rule of the case" and therefore controlling here, if it were not for the fact that the prior decision turned upon a determination of a question of law, which we believe cannot be supported.

tative, we do not find that the respondent has refused to bargain with the CIO in violation of Section 8 (1) and (5) of the Act.

Having found that the respondent has not engaged in the unfair labor practices alleged in the complaint, we shall dismiss the complaint in its entirety.

Upon a reconsideration of the findings in Case No. 8-R-1295, we have concluded that Gendelman was not an employee of the respondent at the time when he cast his ballot in the election held as part of the investigation to ascertain representatives for the purposes of collective bargaining with the respondent. It follows that, contrary to the Board's previous finding, the results of the balloting fail to show that a majority of the employees in the appropriate unit selected the CIO as their bargaining representative. Accordingly, we shall set aside the Certification of Representatives in Case No. 8-R-1295. In view of the length of time that has elapsed since the filing of the petition for investigation and certification of representatives therein, we shall also dismiss the petition filed by the CIO, without prejudice to the right of the CIO to file a new petition if it so desires.

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

#### CONCLUSIONS OF LAW

1. The operations of the respondent, Midland Steamship Line, Inc., Cleveland, Ohio, constitute trade, traffic, and commerce among the several States, within the meaning of Section 2 (6) of the Act.

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

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

#### ORDER

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board orders that the complaint against the respondent, Midland Steamship Line, Inc., Cleveland, Ohio, be, and it hereby is, dismissed.

AND IT IS FURTHER ORDERED that the certification dated October 17, 1944, of the National Maritime Union of America, affiliated with the Congress of Industrial Organizations, as the exclusive bargaining representative of all unlicensed personnel, including stewards, on all vessels of Midland Steamship Line, Inc., in Case No. 8-R-1295, be, and it hereby is, vacated and set aside.

AND IT IS FURTHER ORDERED that the petition for investigation and certification of representatives of employees of Midland Steamship Line, Inc., Cleveland, Ohio, in Case No. 8-R-1295, be, and it hereby is, dismissed, without prejudice.

MR. JOHN M. HOUSTON, dissenting:

I do not agree with the dismissal of this complaint; on the contrary, I would affirm the Trial Examiner's Report. That Report is based squarely upon the Board's supplemental decision as a result of which the Union was certified. The record in that proceeding is essentially the same as that before us now. The majority, however, upon reconsideration, has concluded that the respondent's contention that Gendelman was not an employee when he voted is entitled to decisive significance. Because Gendelman's vote is dispositive of the Union's majority status, my colleagues now find that the Union was not entitled to our certificate. I think the supplemental decision disposed of all contentions properly and I find no warrant in anything before us now for overturning any part of that decision.

In concluding that Gendelman was not an employee when he voted, the majority has emphasized his statement of an intent to quit, communicated by him to his first mate before he voted. Apparently finding that declaration to be substantiated by a course of conduct consistent with its meaning, my colleagues now hold that Gendelman did in fact terminate his employment before he voted. But in our prior decision the Board considered precisely the same factual context and stated:

It is evident, therefore, that although his pay stopped on June 7, 1944, he was still in the course of his employment at 4:20 a. m. on June 8, 1944, when he voted prior to leaving his ship.

This finding was made by the Board in clear cognizance of the same facts now construed by the majority to negative it. Moreover, the Board in the prior decision stated further:

It is immaterial that on June 7, 1944, Gendelman announced his intent to quit at the end of the voyage.

The factor, therefore, upon which the majority of the Board in the present case depends most heavily was deemed immaterial in the prior proceeding. Nothing has occurred since to cause me to attribute to our prior finding a different meaning.<sup>14</sup> I would find that Gendelman was an employee when he voted, and that the Union received a majority vote. The respondent's admitted refusal is, therefore, in clear violation of the Act.

<sup>14</sup> Identical factual contexts call for consistent application of law unless some overriding consideration of policy intervenes. The Board, in the prior decision, found, *as a matter of law*, that Gendelman's employment had not terminated when he voted. I find nothing in the way of new legal authority in the decision of the majority beyond the statement that the prior decision may not be supported. The "rule of the case" therefore should be the Board's prior decision.