

In the Matter of PROTECTIVE MOTOR SERVICE COMPANY, A CORPORATION
and TWENTY-FIVE EMPLOYEES

Case No. C-25.—Decided March 12, 1940

Motor Truck Transportation Industry—Complaint: dismissed for lack of evidence to sustain jurisdiction of the Board.

Mr. Gerhard P. Van Arkel, Mr. Stanley Root, and Mr. Samuel Zack, for the Board.

Mr. Albert L. Moise and Ballard, Spahr, Andrews & Ingersoll, by Mr. Warwick Potter Scott and John V. Lovitt, of Philadelphia, Pa., for the respondent.

Mr. David H. Felia, of Philadelphia, Pa., of counsel for 15 employees.

Miss Hilda Droschnicop, Mr. Nathan Witt, and Mr. Allan Lind, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon charges filed December 5, 1935, by Thomas J. Wohlan, the National Labor Relations Board, herein called the Board, by the Regional Director for the Fourth Region (Philadelphia, Pennsylvania), issued its complaint and notice of hearing dated December 26, 1935, against Protective Motor Service Company, Philadelphia, Pennsylvania, 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 (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act.

The complaint alleged in substance that between October 30 and December 3, 1935, the respondent discharged and refused to restate 24¹ named persons employed by the respondent as "drivers"²

¹The complaint erroneously alleged that 25 employees had filed charges against the respondent. It appears from the record that only 24 employees are involved.

²At the hearing Board's counsel moved to amend the complaint to include the phrase "or in other capacities" after the word "drivers." The Trial Examiner granted the motion. The respondent reserved an exception to the Trial Examiner's ruling. The ruling is hereby affirmed.

for the reason that they joined and assisted a labor organization known as the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local No. 470, herein called the Union, and engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection; and that by such discharges and refusals to reinstate, the respondent interfered with, restrained, and coerced, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act. The complaint and accompanying notice of hearing were duly served upon the respondent and Thomas J. Wohlan. In its answer, dated January 2, 1936, the respondent denied that it was engaged in interstate commerce and denied that it had engaged in the alleged unfair labor practices.

Pursuant to notice, a hearing was held in Philadelphia, Pennsylvania, on January 8, 9, 10, and on February 6 and 8, 1936, before Walter Wilbur, the Trial Examiner duly designated by the Board. The Board and the respondent were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to produce evidence bearing upon the issues was afforded all parties. At the close of the hearing respondent's counsel moved to dismiss the complaint as to Harry Uditzky, Paul Birch, Earl Chafin, Horace Weston, and C. W. Hartman, on the ground that they had not appeared to testify and that the evidence as to them did not support the allegations of the complaint. Counsel for the Board consented to dismiss only as to Chafin. The Trial Examiner reserved decision upon the respondent's motion. As to Chafin, the motion to dismiss is hereby granted. As to Uditzky, Birch, Weston, and Hartman the motion is hereby denied. During the course of the hearing the Trial Examiner made various other rulings on motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

By order of the Board, dated January 9, 1936, the proceeding was transferred to and continued before the Board in accordance with Article II, Section 35, of National Labor Relations Board Rules and Regulations—Series 1. On February 28, 1936, the respondent filed a brief with the Board.

On March 11, 1936, Harry C. Pfaff, Thomas J. Wohlan, David C. Jenkins, Paul S. Birch, and Horace A. Weston filed requests with the Board that their names be stricken from the complaint in the proceeding. On April 28, 1936, the Board issued a Decision and Order in this case, wherein the requests of the above-named employees were granted. In its decision the Board found that the

respondent had discriminatorily discharged 18 named employees in violation of Section 8 (1) and (3) of the Act. It ordered the respondent to cease and desist from such unfair labor practices and to reinstate certain named employees with back pay.³

On May 1, 1936, the respondent filed a petition with the Board for leave to offer additional testimony, for rehearing, oral argument, vacation or modification of the order issued by the Board, and for a stay of all proceedings thereunder. On May 4, 1936, the Board denied the petition, and on May 6 it issued an amendment to its decision correcting certain minor errors therein.⁴

On or about May 13, 1936, the respondent filed a petition in the United States Circuit Court of Appeals for the Third Circuit for leave to adduce additional evidence before the Board and requesting that all proceedings be stayed until further order of the Court. Thereafter, one of the judges of the Court entered an *ex parte* order granting said petition. Thereafter, the Board, appearing specially, moved the Court to dismiss the petition filed by the respondent, and moved that the order of the Court to adduce additional evidence be overruled and that the order staying the proceedings be dissolved. On June 5, 1936, the respondent filed a petition with the Court purportedly appealing from the Board's Order of April 28, 1936, and praying that said appeal be allowed and the Board's Order be set aside. On June 5, 1936, the Court, by a judge thereof, entered an order granting said appeal.

On July 13, 1936, H. C. Pfaff, Thomas J. Wohlan, and David C. Jenkins filed with the Board a petition praying the Board to reinstate their names to the original charge and complaint and to amend its decision in the case by adding their names to the list of employees to whom relief was granted. Thereafter, on July 17, 1936, the respondent filed its answer to the petition. Thereafter, the Board issued a notice of further hearing to be held in the case with respect to the petition referred to above. Notice of such hearing was duly served upon the parties. On August 6, 1936, such further hearing was held before Walter Wilbur, the Trial Examiner duly designated by the Board. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded to the parties. During the course of the hearing, the Trial Examiner made rulings on motions and on objections to the admission of evidence. The Board has reviewed all the rulings of the Trial Examiner and finds that no prejudicial errors were

³ 1 N. L. R. B. 639.

⁴ By the amendment the Board directed that the name "Clarence Bailey," which had been inadvertently left out of the order, to be inserted therein, and changed a sentence in its findings of fact to read, "Respondent carries insurance of \$5,000,000," 1 N. L. R. B. 650.

committed. The rulings are hereby affirmed. On August 10, 1936, counsel for the respondent filed with the Board a separate answer to the petition of the three employees.

On May 6, 1937, a stipulation was entered into between the Board and the respondent providing that the Court's orders referred to above be vacated; that the Board might issue its order and amend its decision by disposing of the petition of the three employees; that a petition for review might then be filed by the respondent, after which the Board would certify the testimony and exhibits; and that the respondent might then move the Court for leave to take additional evidence. On May 29, 1937, the respondent filed with the Court a petition for leave to adduce additional evidence before the Board. On June 1, 1937, the Court upon motion of the Board and acting pursuant to the stipulation referred to above ordered its previous orders of May 13, 1936, and June 5, 1936, vacated and set aside, and also dismissed the petition filed by the respondent on May 29, 1937.

On June 9, 1937, the Board issued a supplemental decision in the case in which it added the names of Harry C. Pfaff and Thomas J. Wohlan to the order of the Board made on April 28, 1936, and dismissed the petition of David C. Jenkins without prejudice.⁵ Copies of such supplemental decision were duly served upon the parties.

On April 19, 1938, the Board, acting pursuant to Section 10 (e) of the Act, filed in the United States Circuit Court of Appeals for the Third Circuit a petition for the enforcement of its order in the case. On June 14, 1938, following the decision of the Supreme Court of the United States on April 28, 1938, in *Morgan v. United States*, 304 U. S. 1, the Board filed a motion to withdraw its petition for enforcement and the transcript of the record which had previously been filed with the Court, for the purpose of further proceedings. The Board's motion to withdraw its petition for enforcement was granted on June 27, 1938. On July 18, 1938, the Board issued an order setting aside the findings and order made on April 28, 1936, and on August 1, 1938, issued an order setting aside the amendments to said findings and order made on May 6, 1936, and on June 9, 1937, respectively.⁶

On June 21, 1939, counsel for 15 of the persons named in the complaint filed a petition to reopen the case and to have oral argument. On July 28, the Board issued an order directing the case to be reopened for further proceedings before the Board, but denying the above petition in so far as it requested permission to argue orally before the Board or to present additional evidence. On August 1, 1939, the counsel for the 15 persons filed a petition to present further testimony be-

⁵ 2 N. L. R. B. 934.

⁶ 8 N. L. R. B. 309.

fore the Board. On December 11, 1939, the Board issued an order in which it denied the aforesaid petition of counsel, and on the same day the Board ordered that proposed findings of fact, proposed conclusions of law, and proposed order be issued. The order further provided that the parties should have the right, within twenty (20) days from the receipt of said proposed findings of fact, proposed conclusions of law, and proposed order, to file exceptions, to request oral argument before the Board, and to request permission to file a brief with the Board.

On December 18, 1939, the Board issued Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order, copies of which were duly served upon the parties. On January 25, 1940, the respondent and counsel for the 15 complainants filed exceptions to the Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order. On January 29 the respondent filed a brief in support of its exceptions. On January 30 oral argument was had before the Board. Counsel for the respondent and counsel for the 15 complainants appeared and participated therein. At the oral argument counsel for the 15 complainants withdrew his exceptions to the Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order. Thereafter, on February 8 and 16, respectively, counsel for the 15 complainants and counsel for the respondent filed additional briefs which have been duly considered by the Board.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent, Protective Motor Service Company, is a corporation organized under the laws of the State of Pennsylvania, having its principal office and place of business in Philadelphia, Pennsylvania. It is engaged in the business of transporting valuables in armored cars, and operates approximately 45 to 50 armored trucks, each of which is manned by a driver and at least one guard. The valuables transported include coinage and United States bonds. The respondent's business is capitalized at \$25,000. Its annual gross pay roll is in excess of \$150,000, and constitutes 77 per cent of the total running expenses of the concern. The respondent also carries insurance of \$5,000,000.

The greater part of the respondent's business consists of transporting valuables for local concerns in the City of Philadelphia or its vicinity. The respondent also maintains a truck in Atlantic City, New Jersey, which is used to transport valuables within that city.

The daily schedule of trips made by the respondent's trucks includes two daily routes to points outside of Pennsylvania; to Trenton and

to Atlantic City, New Jersey, respectively. In addition, the respondent's trucks make trips to New York as required by customers. On the average, at least one such trip is made monthly; frequently several trips a month are made. Weekly trips to Camden, New Jersey, also form a regular part of the respondent's business. Other unscheduled interstate routes include those to Washington, D. C.; Baltimore, Maryland; and Wilmington, Delaware. It is not clear from the record what percentage of the respondent's trucks are used in these operations. Nor does the record disclose the proportion of time spent by the employees on trips in interstate commerce.

Captain Marsh, president of the respondent, testified that less than 1 per cent of the respondent's business is in interstate commerce. The respondent in its brief asserts that in 1935 the gross revenue of the respondent amounted to \$253,912.36; that of this amount only \$1,638.71 represented revenue derived from jobs in which goods protected by the respondent crossed a State line; and that this proportion is slightly less than .65 of 1 per cent of the total gross revenue. However, there is no evidence in the record to support these assertions.

On February 6, 1936, the respondent filed an application with the Interstate Commerce Commission for a permit or certificate authorizing the continuance of operations in interstate or foreign commerce under the "grandfather" clauses of Section 206 (a) and 209 (a) of the Federal Motor Carrier Act of 1935. The respondent sought the continuance of operations between Philadelphia on the one hand and New York City, Baltimore, Maryland, Washington, D. C., and all points in Pennsylvania, New Jersey, and Delaware on the other hand. The Railway Express Agency, Inc., opposed granting the application.

The evidence of the respondent's operations before the Interstate Commerce Commission was confined to movements within Philadelphia, between Philadelphia and New York City, and respectively within Camden, Trenton, and Atlantic City, New Jersey. These operations, other than between Philadelphia and New York, appeared to be entirely in intrastate commerce, as to which the Interstate Commerce Commission declared it had no jurisdiction. The Commission also held that the "meager" interstate services engaged in by the respondent did not meet the requirements of the "grandfather" clauses of the Act, and therefore denied the application on October 11, 1939.

We are of the opinion that the facts set forth in the record are not sufficiently developed to afford a basis for determining whether or not the operations of the respondent affect commerce, within the meaning of the Act.⁷ Under such circumstances we ordinarily would dis-

⁷ Cf. *Matter of San Diego Ice and Cold Storage Co., a corporation and International Longshoremen's & Warehousemen's Union*, 17 N. L. R. B. 422; *Matter of Yellow Cab and Baggage Company and International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, Local Union #762, affiliated with the American Federation of Labor*, 17 N. L. R. B. 469

miss the complaint without prejudice. However, in view of the long period of time which has elapsed since the filing of the charges, and the nature of the proceedings heretofore had, the Board, acting within the discretion granted it by Section 10 of the Act, does not deem it advisable to reopen the record upon this point. We shall, therefore, dismiss the complaint in its entirety.

ORDER

Upon the basis of the foregoing findings of fact and pursuant to Section 10 (c) of the National Labor Relations Act the National Labor Relations Board hereby orders that the complaint against the respondent, Protective Motor Service Company, Philadelphia, Pennsylvania, be, and it hereby is, dismissed.

MR. WILLIAM M. LEISERSON took no part in the consideration of the above Decision and Order.