

In the Matter of COSMOPOLITAN SHIPPING COMPANY, INC. and  
NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, LOCAL  
No. 33

*Case No. R-117.—Decided April 2, 1937*

*Water Transportation Industry—Employer:* managing and operating company—*Strike:* provoked by employer's refusal to bargain with union—*Employee Status:* during strike—*Investigation of Representatives:* controversy concerning representation of employees—refusal by employer to negotiate with union; strike—question affecting commerce: current strike of employees directly engaged in interstate commerce—*Unit Appropriate for Collective Bargaining:* licensed personnel; no controversy as to—*Representatives:* proof of choice: membership in union; participation in strike called by union—*Certification of Representatives:* after investigation but without election.

*Mr. David A. Moscovitz* for the Board.

*Mr. Horace M. Gray*, of New York City, for the Company.

*Mr. William E. Collins*, District Counsel, for the United States Maritime Commission.

*Mr. William Gallagher*, of New York City, for International Union of Operating Engineers.

*Mr. Herbert J. De Varco*, of New York City, for United Licensed Officers.

*Mr. Edward P. Trainer*, of New York City, for National Marine Engineers' Beneficial Association.

*Mr. Aaron W. Warner*, of counsel to the Board.

## DECISION

### STATEMENT OF CASE

On October 9, 1936, National Marine Engineers' Beneficial Association, Local No. 33, hereinafter referred to as M. E. B. A., filed with the Regional Director for the Second Region (New York City) a petition alleging that a question affecting commerce had arisen concerning the representation of the licensed engineers employed on the vessels operated by Cosmopolitan Shipping Company, Inc., New York City, hereinafter referred to as the Company, and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, hereinafter referred to as the Act.

Subsequent to the filing of the petition, a question arose as to whether the Company is the "employer" as defined in Section 2,

subsection (2) of the Act, of the licensed engineers employed on the vessels referred to in the petition, or whether the United States of America, hereinafter referred to as the Government, which is the owner of the vessels, is in fact the "employer" as so defined. On December 5, 1936, the National Labor Relations Board, hereinafter referred to as the Board, issued a notice of a hearing to be held in Washington, D. C., on December 14, 1936, for the sole purpose of hearing argument on this question. Copies of the notice of hearing were duly served upon the Company, M. E. B. A., the United States Maritime Commission, hereinafter referred to as the Maritime Commission, and on the International Union of Operating Engineers, Local No. 3, hereinafter referred to as I. U. O. E., and the United Licensed Officers of the U. S. A., hereinafter referred to as U. L. O., both of which organizations had been named in the petition as purporting to represent the engineers. With the exception of M. E. B. A., none of these parties appeared at the hearing. As a consequence of the failure of the parties to appear, the question raised was not resolved at this hearing.

On December 23, 1936, the Board duly authorized the Regional Director for the Second Region to conduct an investigation and to provide for an appropriate hearing. On December 30, 1936, the Regional Director issued a notice of a hearing upon the question of representation, as well as upon the question of whether the Company or the Government is the employer in this case, to be held in New York City on January 11, 1937. Copies of the notice of hearing were duly served upon the aforementioned parties. Pursuant to the notice, a hearing was held in New York City on January 11, 1937, before Robert Gates, duly designated by the Board as Trial Examiner. All of the parties served with notice were represented and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues was afforded all parties. The Board has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

Upon the evidence adduced at the hearing and from the entire record now before it, the Board makes the following:

#### FINDINGS OF FACT

##### I. THE COMPANY

Cosmopolitan Shipping Company, Inc., a Delaware corporation having its principal office and place of business at 42 Broadway, New York City, is engaged in the management and operation of vessels for the transportation of freight and passengers for hire

between United States Atlantic ports and French Atlantic and French Channel ports.

The Company, which is privately owned and controlled, operates five vessels, all of which are owned by the Government, under the name of the American France Line. An Operating Agreement<sup>1</sup> between the Government and the Company designates the latter as managing agent for and on behalf of the Government.

The Company operates as a common carrier, transporting freight for private interests, as well as for the Government. Freight which is carried for the Government is paid for in the same manner as other freight. The Company is engaged in no business other than the operations described above.

A chief and three assistant engineers are employed on each of the five vessels.

We find that the Company is engaged in transportation and commerce between the States and between the United States and foreign countries, and that the marine engineers employed on the vessels operated by the Company are directly engaged in such transportation and commerce.

## II. THE UNION

M. E. B. A. is a national labor organization, with a membership of approximately 7500. Of this number, approximately 1100 members operate out of the Port of New York. The membership of the organization is limited to licensed marine engineers.

## III. THE COMPANY AS THE EMPLOYER

In determining whether M. E. B. A. may be certified as the exclusive representative for collective bargaining, a question arises as to the relation of the Company to the licensed engineers employed on the vessels which it operates. The Company has contended that the Government, and not itself, is the employer of these engineers.

Under the terms of the Operating Agreement between the Government and the Company, the latter undertakes to man, equip, victual, supply, and operate the vessels, the actual costs and expenses to be paid by the Government with the exception of overhead, for which the Company receives a fixed sum per month. In addition to overhead expenses, the Company receives as compensation, three per cent

<sup>1</sup>The agreement, dated October 4, 1935, was entered into between the United States of America, represented by the Secretary of Commerce, acting by and through the United States Shipping Board Merchant Fleet Corporation, and Cosmopolitan Shipping Company, Inc. See Board's Exh No. 2. The agreement, as modified in an addendum, remains in effect until June 29, 1937. The United States Shipping Board Merchant Fleet Corporation was dissolved by act of Congress (49 Stat. 1246, June 29, 1936), its contractual obligations assumed by the United States, and its records, books, papers and corporate property taken over by the newly created Maritime Commission.

of all gross revenue and a sum equivalent to 25 per cent of the net profits earned during the period of the Agreement. To insure faithful performance of its obligations under the Agreement, the Company is required to furnish a bond in the amount of \$50,000. The Agreement provides further that the licensed officers and chief steward are to be subject to the approval of the Government, and that the Government shall have the right to require their removal if it shall have reason to be dissatisfied. It is also provided that the vessels shall be manned by crews obtained so far as possible through the Shipping Service of the Department of Commerce.

Section 2, subdivision (2) of the Act provides as follows: "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof . . ."

It appears to us that the Government, in turning over the operation and management of its vessels to a private corporation under the existing Agreement, has avoided, rather than assumed, the responsibilities of an employer. It has established the American France Line as a commercial venture, operating in competition with other lines. In the conduct of the business of the line, the Company is in full charge, receiving compensation based on the results of its own efforts. The Company, under the nominal supervision of the Government, does the actual hiring of the employees and has the sole direction of their activities while engaged in their duties on board the vessels. Under these circumstances, we do not feel that the Government can be said to be the employer of the engineers on its vessels. Furthermore, we are satisfied that the exemption of the Government from the operation of the Act was not meant to apply in the case of a commercial venture of this nature. We find, therefore, that the Company, in hiring the licensed engineers employed on the vessels which it operates, is an employer under the provisions of the Act.

#### IV. THE QUESTION CONCERNING REPRESENTATION

The question concerning representation was raised at the hearing through the contention of the Company that none of the engineers who claim representation by M. E. B. A. in the petition are employees of the Company any longer. However, Colonel G. Bartlett, the operating manager of the Company, testified that 17 of the 20 engineers employed before the end of October, 1936—prior to the labor dispute in this case—had been members of M. E. B. A., and that all of them had gone on strike during the subsequent months of November and December, 1936, and during the early part of January, 1937. Some of these engineers, according to Bartlett, broke their shipping articles on instructions from M. E. B. A. Bartlett testified that these engi-

neers were still on strike at the time of the hearing, and that they had been replaced by employees unaffiliated with M. E. B. A. It was conceded that each of the striking engineers had a good record, and had been employed on the vessels operated by the Company from six to 12 or more years.

Edward P. Trainer, business manager of M. E. B. A., testified that prior to the filing of the petition in this case he had requested officials of the Company to deal with M. E. B. A., and had been informed that the Shipping Board was the proper party with which to negotiate regarding wages, hours, and working conditions. Trainer then interviewed Captain Conway, a representative of the Shipping Board. Conway declared that before negotiations could be undertaken, it would first be necessary for Trainer to determine whether the Company or the Shipping Board was the party with which to deal, and suggested that Trainer file a petition with the National Labor Relations Board in order to resolve this question. Trainer then filed the petition.

Shortly thereafter the M. E. B. A. engineers on the vessels operated by the Company went out on strike. Trainer testified that about the third week in November he made a further unsuccessful attempt to negotiate with the Company on behalf of the striking engineers.

Under these circumstances, we must reject as unsound the contention of the Company that none of its striking engineers are employees. Section 2, subdivision (3) of the Act provides that the term "employee" shall include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment". In accordance with this provision, we have consistently held that an employee who has struck as the result of an "unfair labor practice" is still an employee. The facts in this case bring it within the terms of the provision. The Company admittedly refused to bargain with the representative of its employees, but has based this refusal on its inability at the time to determine its status as employer. Assuming that the Company was acting in good faith in making this contention, its refusal to bargain with its employees was an unfair labor practice within the meaning of the Act. The Act has numbered the refusal by an employer to bargain with employees as one of the causes of industrial strife to be eliminated through the enforcement of its provisions. The mistaken judgment of an employer in refusing to carry out the mandate of the Act cannot be permitted to stand in the way of the fulfillment of its expressed purpose. The employees who struck because of the Company's refusal to bargain therefore ceased work because of an unfair labor practice, and are still em-

ployees within the meaning of Section 2, subdivision (3) of the Act. Aside from the language of the Act, this conclusion is logical. Assuming the employer's good faith, the removal of the imagined obstacle in the way of its consenting to bargain must necessarily result in its acquiescence to deal with the representative of those employees whom it has unwittingly wronged.

But even if we did not find that the Company in this case had engaged in an unfair labor practice, the employees who struck would still be employees within the meaning of Section 2, subdivision (3) of the Act. The conflict between the claims of the striking engineers and the Company unquestionably constitutes a "labor dispute" within the meaning of Section 2, subdivision (9) of the Act. This dispute was followed by a strike which was in progress at the time of the hearing, and is therefore a "current labor dispute" for the purposes of this decision. In *Matter of Columbian Enameling and Stamping Co. and Enameling and Stamping Mill Employees Union No. 19694*, Case No. C-14, decided February 14, 1936 (I. N. R. L. B. 181), we held that a striking employee whose work has ceased in connection with a labor dispute remains an employee as long as the strike is current. This principle is applicable here.

Since nothing has occurred to deprive the strikers of their status under the Act as employees, it remains the duty of the Company to negotiate with them as such. The claim by the Company that it has replaced its striking employees is of no consequence since no act of the employer short of bargaining collectively with these employees can relieve it of its obligation under the Act.

We find, therefore, that a question has arisen concerning the representation of the licensed marine engineers employed on the vessels of the Company and that this question has led and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE APPROPRIATE UNIT

No question was raised at the hearing as to the appropriateness of the licensed marine engineers as a unit for the purposes of collective bargaining. In the absence of any evidence which would indicate what the situation is in any wise different from that existing in other cases where we found the licensed engineers to be an appropriate unit,<sup>2</sup> we find that the licensed chief and assistant engineers employed on the vessels operated by the Company constitute a unit appropriate for the purposes of collective bargaining in respect to

<sup>2</sup> See: *In the Matter of Panama Rail Road Company and Marine Engineers Beneficial Association*, Case No. R-108, decided October 21, 1936 (*supra*, p. 290), and cases cited therein.

rates of pay, wages, hours of employment and other conditions of employment.

#### VI. CONCLUSION

In view of the admission by the Company at the hearing that 17 of the 20 engineers employed on the vessels operated by the Company had participated in the strike as members of M. E. B. A., and in view of the uncontradicted evidence submitted by Trainer to the effect that these employees are still on strike and have authorized M. E. B. A. to represent them for the purposes of collective bargaining,<sup>3</sup> we find that M. E. B. A. has been designated as their representative for the purposes of collective bargaining by a majority of the licensed engineers employed on the vessels operated by the Company, and, pursuant to Section 9 (a) of the Act, is the exclusive representative of all the licensed engineers so employed.

#### CONCLUSIONS OF LAW

Upon the basis of the above findings of fact, the Board makes the following conclusions of law:

1. The strike of the licensed chief and assistant engineers employed on the vessels operated by the Cosmopolitan Shipping Company, Inc., is a labor dispute, within the meaning of Section 2, subdivision (9) of the Act.

2. The licensed chief and assistant engineers employed on the vessels operated by the Cosmopolitan Shipping Company, Inc., who are on strike are employees of the Cosmopolitan Shipping Company, Inc., within the meaning of Section 2, subdivision (3) of the Act.

3. A question affecting commerce has arisen concerning the representation of the licensed chief and assistant engineers employer by Cosmopolitan Shipping Company, Inc., within the meaning of Section 9 (c) of the National Labor Relations Act.

4. The licensed chief and assistant engineers employed by Cosmopolitan Shipping Company, Inc., constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the National Labor Relations Act.

5. National Marine Engineers' Beneficial Association, Local No. 33, having been designated by a majority of the licensed chief and assistant engineers employed by Cosmopolitan Shipping Company, Inc., as their representative for the purposes of collective bargaining, is, by virtue of Section 9 (a) of the Act, the exclusive representative

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<sup>3</sup>Trainer submitted in evidence 17 signed authorization cards, bearing dates which ranged from September 30, 1936, to January 11, 1937. Board's Exhibits Nos. 3 to 7.

of all such engineers for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

### CERTIFICATION OF REPRESENTATIVES

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, 49 Stat. 449, and pursuant to Article III, Section 8 of National Labor Relations Board Rules and Regulations—Series 1, as amended,

• IT IS HEREBY CERTIFIED that National Marine Engineers' Beneficial Association, Local No. 33, has been designated by a majority of the licensed chief and assistant engineers employed by Cosmopolitan Shipping Company, Inc., New York City, as their representative for the purposes of collective bargaining with Cosmopolitan Shipping Company, Inc., and that, pursuant to the provisions of Section 9 (a) of the National Labor Relations Act, National Marine Engineers' Beneficial Association, Local No. 33, is the exclusive representative of all such engineers for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

MR. DONALD WAKEFIELD SMITH took no part in the consideration of the above Decision and Certification of Representatives.