

In the Matter of AMERICAN-HAWAIIAN STEAMSHIP COMPANY *and*
NATIONAL ORGANIZATION, MASTERS, MATES AND PILOTS OF AMERICA,
WEST COAST LOCAL No. 90

In the Matter of OCEANIC & ORIENTAL NAVIGATION COMPANY *and*
NATIONAL ORGANIZATION, MASTERS, MATES AND PILOTS OF AMERICA,
WEST COAST LOCAL No. 90

In the Matters of AMERICAN-HAWAIIAN STEAMSHIP COMPANY, OCEANIC
& ORIENTAL NAVIGATION COMPANY, AND WILLIAMS STEAMSHIP
CORPORATION *and* NATIONAL ORGANIZATION, MASTERS, MATES &
PILOTS OF AMERICA, WEST COAST LOCAL No. 90

*Cases Nos. C-228, C-229, R-61, R-62, and R-63.—Decided
April 19, 1938*

Water Transportation Industry—Collective Bargaining: charges of refusal
not sustained, complaint dismissed, decision in representation cases amended,
and certification of representatives set aside.

Mr. Bertram Edises, for the Board.

Brobeck, Phleger & Harrison, by *Mr. Moses Laskey*, of San Fran-
cisco, Calif., for the respondents.

Mr. Harry A. Sellery, Jr., of counsel to the Board.

DECISION
AMENDMENT TO DECISION
AND
ORDER

STATEMENT OF THE CASE

Upon separate charges duly filed by National Organization, Mas-
ters, Mates and Pilots of America, West Coast Local No. 90, herein
called the Union, the National Labor Relations Board, herein called
the Board, by Alice M. Rosseter, Regional Director for the Twentieth
Region (San Francisco, California), duly issued and served its com-
plaint dated July 29, 1937, against the respondents, American-
Hawaiian Steamship Company, San Francisco, California, herein
called the American-Hawaiian, and Oceanic & Oriental Navigation

Company, San Francisco, California, herein called the Oriental, alleging that the respondents had engaged in and were 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. In respect to the unfair labor practices, the complaint alleged in substance (1) that the Board, pursuant to Section 9 (c) of the Act and Article III, of National Labor Relations Board Rules and Regulations—Series 1, as amended, on December 12, 1936, found that the licensed deck officers employed as such on the vessels owned and operated by the respondents constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act, that the Union had been designated by a majority of the licensed deck officers employed by the respondents as their collective bargaining representative, that it was therefore the exclusive bargaining representative of all such officers, and that the Board had certified the Union as such;¹ and (2) that about January 23, 1937, and at all times thereafter, the respondents, and each of them, refused to bargain collectively with the Union as the exclusive representative of their licensed deck officers.

On August 9, 1937, the respondents filed their answer in which they denied the substantial allegations of the complaint, except those relating to their corporate existence and relationship. The respondents further affirmatively alleged in substance (1) that the hearing on August 6, 1936, in the cases in which the Board issued its certification was terminated pursuant to a stipulation, that the stipulation provided for an election to be held under the Board's auspices and in accordance with rules of procedure to be laid down by it or its agents, and that if the Union was designated by a majority of such officers and the Board so certified officially, then the respondents would recognize the Union as the sole bargaining representative of the licensed deck officers employed as such on their vessels; (2) that about September 10, 1936, the Regional Director issued a notice of election which was distributed to all such officers; (3) that about September 11, 1936, T. G. Plant, vice president of the American-Hawaiian and in charge of all the respondents' vessels, prepared and

¹ *Matters of American-Hawaiian Steamship Company, Oceanic & Oriental Navigation Company, and Williams Steamship Corporation and National Organization, Masters, Mates & Pilots of America, West Coast Local No. 90*, 2 N. L. R. B. 424. This certification did not include the licensed deck officers on the Oriental's nine vessels operating between ports on the Pacific Coast and Australasia. Such vessels were not involved in that proceeding, and are not involved in this proceeding.

It was stipulated at the hearing in this proceeding that Williams Steamship Corporation, a wholly owned subsidiary of the American-Hawaiian, has been dissolved since the conclusion of the representation proceeding, and its assets, including its vessels, transferred to the American-Hawaiian, which now owns and operates such vessels.

delivered to all such officers, the Regional Director, and the Union, a notice stating in part as follows:

The wish of a majority of those eligible will determine the election result; that is, if a majority of those eligible to vote ask to be represented by the Masters, Mates and Pilots then that organization will represent all of the Deck Officers for the purpose of collective bargaining. If a majority do not vote for the Masters, Mates and Pilots then none of the licensed deck officers will be represented by that organization for the purpose of collective bargaining.

(4) that no objection to the notice or its form was made by the Regional Director or anyone else; (5) that thereafter the Regional Director issued her Intermediate Report on the conduct of the ballot; (6) that thereafter the respondents excepted to the report in that it failed to include any reference to the conditions upon which the election was held; (7) that thereafter the Board certified the Union as the sole bargaining representative of the licensed deck officers; and (8) that the Board's certification is invalid and void. The answer concluded by a motion to dismiss the complaint. The Trial Examiner did not rule on this motion. The motion will be disposed of by our order in these cases.

Pursuant to the notice of hearing, a hearing was held in San Francisco, California, on August 11 and 12, 1937, before Clifford D. O'Brien, the Trial Examiner duly designated by the Board. The Board and the respondents were represented by counsel. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded to all parties.

During the course of the hearing, the Trial Examiner made several rulings on motions and on objections to the admission of evidence. The Board has reviewed such rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed. After the hearing, counsel for the respondents submitted a brief to the Trial Examiner in behalf of the respondents.

On September 2, 1937, the Trial Examiner duly filed his Intermediate Report, which was served upon the parties. He found that the respondents had engaged in and were engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the Act, and recommended that the respondents cease and desist from these violations, and that the respondents bargain collectively with the Union. Counsel for the respondents filed exceptions to the Intermediate Report and the conduct of the hearing and a brief in behalf of the respondents. We have considered the exceptions to the Intermediate Report and the conduct of the hearing and the briefs submitted, but, save for the

exceptions which are consistent with the findings and conclusions set forth below, we find the exceptions to be without merit.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENTS

American-Hawaiian Steamship Company, incorporated in New Jersey, operates steam vessels and motorships for the transportation of freight between the Pacific Coast ports of Los Angeles, Oakland, and San Francisco, California, Astoria and Portland, Oregon, and Seattle and Tacoma, Washington, and the Atlantic Coast ports of Charleston, South Carolina, Norfolk, Virginia, Baltimore, Maryland, Philadelphia, Pennsylvania, Port Newark, New Jersey, New York City, and Boston, Massachusetts, and between the said Pacific Coast ports and Puerto Rico. In twelve ports it has offices at which it receives and delivers cargo, and it employs agents on a commission basis at others. In addition, it has offices in four interior cities, and agents in Liverpool, England, and Honolulu, Territory of Hawaii.

Oceanic & Oriental Navigation Company, incorporated in Delaware, is a corporation in which 50 per cent of the capital stock is owned by the American-Hawaiian. The Oriental owns 17 vessels, and eight of its vessels are operated by the American-Hawaiian, as its managing agent, between Pacific Coast ports and the Orient. It is engaged in the transportation of freight between ports in the United States and foreign countries.

II. THE UNION

National Organization, Masters, Mates and Pilots of America, West Coast Local No. 90, is a labor organization, affiliated with the American Federation of Labor. It was organized in 1933, and its jurisdiction includes Pacific Coast ports from Nome, Alaska, to San Diego, California.

III. THE UNFAIR LABOR PRACTICES

A. *The alleged refusal to bargain collectively*

On December 12, 1936, following a hearing on August 6, 1936, the Board issued its decision and certification of representatives certifying, as stated above, that the Union was the exclusive representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment of

the licensed deck officers employed as such on the vessels owned and operated by the respondents.

At the hearing in those cases, a stipulation was entered into by the parties thereto in respect to the holding of an election. The terms of the stipulation were as follows:

That there be an immediate election under the auspices of the National Labor Relations Board, in accordance with the rules of procedure to be laid down or determined by the Board, or its agent; and it is agreed, on behalf of the companies . . . that if . . . Local No. 90 of the Masters, Mates and Pilots, is designated by a majority of the deck officers of these companies, or any of them, which the Board shall certify is a fact officially, the company will recognize the union as the agent of their deck officers for the purpose of collective bargaining.

Thereafter the Board authorized the Regional Director to conduct an election by secret ballot of the licensed deck officers employed on vessels owned and operated by the respondents.

Prior to the election and on August 14 and 19, 1936, representatives of the respondents and the Union attended conferences at the Regional Director's office at which details for the conduct of the election and the form of the notice of election to be issued by the Regional Director were discussed. There is some discrepancy between the testimony of the witnesses for the respondents and for the Union concerning the position adopted by the Regional Director in respect to the stipulation. At these conferences the respondents contended that the correct interpretation of the phrase, "majority of the deck officers", in the stipulation was that a majority of those eligible to vote was required for certification by the Board. The notice of election does not contain the phrase, "majority of the deck officers", nor any interpretation of it.

The testimony is uncontroverted, however, that it was subsequently agreed that the respondents would forward a copy of the notice of election to each of their vessels for exhibition to the licensed deck officers. In a letter dated September 10, 1936, the Regional Director forwarded to Plant, vice president of the American-Hawaiian and operating manager for the respondents, a typewritten copy of the notice of election.

In a letter dated September 11, 1936, and signed by Plant, copies of the typewritten notice of election were forwarded to the masters of the vessels owned and operated by the respondents. Plant's letter instructed each master to give the licensed deck officers on that vessel an opportunity to read the letter and the notice.

We have previously quoted the extract from Plant's letter which appears in the respondents' answer and in which it is stated that the

wish of the majority of those eligible will determine the result of the election. Plant testified that it was agreed that he would prepare a letter to the masters of the respondents' vessels which would supplement the notice of election; and that he was to send copies to the Regional Director and E. B. O'Grady, secretary of the Union, who said they would advise him immediately if the letter was not in accordance with the understanding reached at the conferences as to the interpretation of the stipulation. Plant mailed a copy of his letter to the Union and the Regional Director. According to Plant's testimony, about September 11, 1936, by telephone he asked the Regional Director if she had received a copy of his letter, and if it set forth the understanding correctly. The Regional Director stated that she had received a copy of his letter, and that it was correct. He stated that all masters whom he had interviewed had received a copy of his letter and had made it available to the officers serving under them.

Following the election the Regional Director filed an Intermediate Report, which was duly served upon the parties. With respect to the election the Regional Director reported as follows:

Total number eligible to vote.....	222
Total votes cast for the Union.....	106
Total votes cast against the Union.....	95
Total votes challenged.....	2
	203

The Union thus received a majority of the votes cast, but not the votes of a majority of those eligible to vote.

Since the Union received a majority of the votes cast, the Board on December 12, 1936, issued a decision and certification of representatives certifying the Union. As a precedent for its decision and certification of representatives, the Board cited *Matter of R. C. A. Manufacturing Company, Inc.* and *United Electrical & Radio Workers of America*,² in which the Board ruled that in Section 9 (a) of the Act the phrase, "majority of the employees", refers to a majority of the eligible employees voting in an election, and that the organization receiving a majority of the votes cast is to be certified as the exclusive representative.

Following the Board's decision and certification of representatives, the Union in two letters dated December 23, 1936, and May 22, 1937, respectively,³ requested the respondents to bargain collectively with it. In two letters dated January 6 and June 9, 1937, respectively,⁴ the respondents refused to do so. They stated that the ground for

² 2 N. L. R. B. 168.

³ Board Exhibit Nos. 7 and 9, respectively.

⁴ Board Exhibit Nos. 8 and 11, respectively.

their refusal was the invalidity of the Board's decision and certification of representatives. As reason for its invalidity they stated that it was contrary to the stipulation and the notice. The January 6 letter stated that copies of the notice of September 11, 1936, had been promptly given to the Regional Director and the Union and that neither had raised any objection.

As we indicated in the decision in the representation cases, we are of the opinion that the phrase in the stipulation, "designated by a majority of the deck officers", should, in the absence of other considerations, be interpreted to mean a majority of the deck officers voting.

We do not feel that this interpretation can be maintained in these cases, however, in view of the respondents' letter of September 11, 1936. Article IV, Section 1 (b), of National Labor Relations Board Rules and Regulations—Series 1, as amended, designates the Regional Director as the Board's agent to investigate concerning the representation of employees, in accordance with Section 9 (c) of the Act. While the Regional Director was acting as such agent she received a copy of this letter, and stated that it was correct. Her failure to object to the language of the letter under the circumstances must be deemed to constitute assent of the Board to it. The facts concerning the distribution of the respondents' letter, its receipt by the Regional Director, and her agreement to it were not before the Board at the time it issued the decision and certification of representatives. With such facts now in the record, we find it necessary to dismiss the complaint, to amend the decision in the representation cases, and to set aside the certification of representatives.

Our conclusion that the respondents have not refused to bargain collectively, within the meaning of the Act, is based on such evidence as appears in the record. It does not preclude the possibility that new evidence or another election might establish an obligation on the part of the respondents to negotiate with the Union as the exclusive representative of their employees in the appropriate unit.

CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact and upon the entire record in both representation and complaint cases, the Board makes the following conclusions of law:

1. The operations of the respondents, American-Hawaiian Steamship Company and Oceanic & Oriental Navigation Company, occur in commerce, within the meaning of Section 2 (6) of the Act.

2. National Organization, Masters, Mates and Pilots of America, West Coast Local No. 90, is a labor organization, within the meaning of Section 2 (5) of the Act.

3. National Organization, Masters, Mates and Pilots of America, West Coast Local No. 90, is not the exclusive representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment of the licensed deck officers employed as such on the vessels owned and operated by the respondents.

4. The respondents have not engaged in and are not engaging in unfair labor practices, within the meaning of Section 8 (1) and (5) of the Act.

ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) and (d) of the National Labor Relations Act, the National Labor Relations Board hereby amends its decision of December 12, 1936, in the *Matters of American-Hawaiian Steamship Company, Oceanic & Oriental Navigation Company, and Williams Steamship Corporation and National Organization, Masters, Mates & Pilots of America, West Coast Local No. 90, supra*, by striking therefrom the last sentence of Section V of the findings of fact and the last paragraph of the conclusions of law therein.

It is further ordered that the Board's Certification of Representatives heretofore made in the aforesaid cases be, and it hereby is, set aside.

And it is further ordered that the complaint be, and it hereby is, dismissed.