

In the Matter of DELAWARE-NEW JERSEY FERRY COMPANY and
MARINE ENGINEERS' BENEFICIAL ASSOCIATION No. 13

Case No. C-4.—Decided December 30, 1935

Water Transportation Industry—Evidence—Unit Appropriate for Collective Bargaining: craft; distinctiveness of occupation; licensed personnel—Representatives: proof of choice; membership in union; statement designating—Collective Bargaining: refusal to negotiate with representatives.

*Mr. Gerhard P. Van Arkel and Mr. Nathan Witt for the Board.
Lewis, Wolff & Gourlay, by Mr. Otto Wolff, Jr., of Philadelphia,
Pa., for respondent.*

Mr. M. Herbert Syme, of Philadelphia, Pa., for the Union.

Mr. Lawrence A. Knapp, of counsel to the Board.

DECISION

STATEMENT OF CASE

A charge having theretofore been filed with the Regional Director for Region Four by Marine Engineers' Beneficial Association No. 13 (hereinafter referred to as the Association), the National Labor Relations Board, by the said Regional Director, issued its complaint in this proceeding on October 19, 1935, charging the Delaware-New Jersey Ferry Company (hereinafter referred to as the respondent) with having committed an unfair labor practice affecting commerce in violation of Section 8 (5) of the National Labor Relations Act, by reason of its refusal to bargain collectively with the Association as the representative of the marine engineers employed by respondent.

The complaint states that the respondent, a Delaware corporation, is engaged in the operation of ferry boats for the transportation of vehicles and persons in interstate commerce between New Castle, Delaware and Pennsville, New Jersey, and between Wilmington, Delaware and Pennsgrove, New Jersey; that the marine engineers employed by respondent in the mechanical operation of such ferry boats constitute an appropriate unit for the purpose of collective bargaining; that a majority of those engineers authorized the Association to represent them for the purpose of collective bargaining with the respondent; that, as so authorized, the Association, by Warren C. Evans, its business manager, sought to bargain collectively with the respondent in behalf of the employees referred to; and that, on September 27, 1935,

the respondent refused so to bargain. Prior to the hearing on the complaint the respondent filed a motion to dismiss and an answer. The motion to dismiss, predicated entirely on constitutional grounds, was denied by the Trial Examiner assigned by the Board to hear the case.

In its answer, the respondent denies that it is engaged in transportation in interstate commerce; admits that it refused to bargain collectively with the representative of the Association; but denies knowledge of his authority to represent the engineers, affirmatively alleging that no proof of that authority was produced. The answer also denies that the engineers constitute an appropriate unit for collective bargaining.

With the proceedings in this stage, the testimony and evidence were taken by the Trial Examiner on October 31, 1935, pursuant to the notice of hearing. All parties were present and were afforded full opportunity to be heard. Thereafter, the Trial Examiner rendered his intermediate report finding the charge of the complaint sustained, to which report the respondent filed various exceptions. The following are our findings upon the entire record.

FINDINGS OF FACT

I. THE RESPONDENT AND ITS BUSINESS

1. The respondent is a corporation organized and existing under the laws of the State of Delaware. It operates ferry boats for the transportation of persons and vehicles for hire across the Delaware River between New Castle, Delaware and Pennsville, New Jersey, and between Wilmington, Delaware and Pennsgrove, New Jersey, pursuant to express authority conferred in its corporate charter "to maintain and operate ferries across the Delaware River and Bay between the States of Delaware and New Jersey." At least two boats are operated on regular schedule at each crossing throughout the year. During the summer season four are in operation at the New Castle-Pennsville crossing.

2. The number of vehicles transported by respondent at both crossings for the years from 1930-1934, inclusive, varied from approximately 500,000 in 1930 to approximately 650,000 in 1934, with the first five months of 1935 showing a twenty-five per cent increase in vehicles carried over the corresponding months of 1934. Approximately two-thirds of the vehicles transported over a period of years have borne license tags of states other than New Jersey or Delaware, and approximately fifteen per cent of all motor vehicles transported during such period have been commercial trucks carrying various manufactured and agricultural products.

3. Both crossings maintained by respondent are strategically located with reference to interstate highway traffic. The New Castle-Pennsville crossing is a segment of U. S. Highway No. 40, a transcontinental highway commonly known as the "National Highway," running between Atlantic City, New Jersey and the Pacific Coast. Both crossings are readily accessible from U. S. Highway No. 1, a main interstate highway running north and south through the eastern states and connecting, in the states near Delaware, the following cities: Washington, Baltimore, Philadelphia, Trenton, Newark and New York.

4. Both crossings are particularly advantageous to through interstate traffic between New York City and such points as Wilmington, Baltimore and Washington. Immediately upon entering New Jersey from respondent's New Castle-Pennsville crossing, U. S. Highway No. 40 connects with U. S. Highway No. 130, a main arterial highway to and from New York City. U. S. Highway No. 130 is equally accessible from respondent's Wilmington-Pennsgrove crossing. U. S. Highway No. 130 runs generally north and south in New Jersey between Pennsgrove and Pennsville, and a point near New Brunswick, where it merges with U. S. Highway No. 1 to follow a jointly-occupied highway to New York City. Lying on the eastern side of the Delaware River, U. S. Highway No. 130 necessarily avoids Wilmington and Philadelphia. It circles Camden and passes by Trenton. The area through which it passes is considerably less congested than the area along the western bank of the Delaware River, through which other highways run on substantially parallel lines. A considerable saving of time is effected for the distance between New Castle or Wilmington and New Brunswick by crossing the Delaware on respondent's ferries and following U. S. Highway No. 130 rather than the routes on the western bank.

5. On a highway map published by respondent advertising its crossings, respondent claims:

"THE SHORTEST ROUTES AND FASTEST FROM NEW YORK TO WASHINGTON and from the SOUTH & WEST TO ATLANTIC CITY are via the DELAWARE-NEW JERSEY FERRIES. Avoid congested areas and save time and mileage by using the ferry routes."

Respondent further advertises its boats as of "75 car capacity, the largest on the Delaware."

6. Actual transportation of vehicles and passengers on the waters of the Delaware River in respondent's ferries occurs entirely within the State of Delaware, respondent's ferry slips at Pennsgrove and Pennsville being physically situated 700 feet and 450 feet, respectively, west of the low-water mark on the New Jersey shore. That

mark constitutes the eastern boundary of the State of Delaware at Pennsgrove and Pennsville.

7. Vehicles and passengers received into and discharged from respondent's ferries at its slips on the New Jersey side approach from and proceed to New Jersey territory over pier structures entirely owned by respondent and continuously extending into New Jersey territory from the slips. There is no other method of ingress or egress available on the New Jersey side at either crossing, and the land immediately adjoining the river at both points on the New Jersey side is owned by respondent. Interstate traffic between Delaware and New Jersey proceeds over instrumentalities and property entirely owned and maintained for the purpose of such transportation by respondent.

8. In its operations at both crossings respondent is engaged in the transportation of persons and property in interstate commerce and is an instrumentality of such commerce.

II. RESPONDENT'S EMPLOYEES—THE ENGINEERS AS A UNIT

9. In the operation and maintenance of its ferry boats, respondent employs three classes of personnel between which sharp distinctions exist, namely, pilots, engineers and unlicensed personnel or crew.

10. Each of respondent's ferries carries one pilot. The pilot is in general command of each vessel, its personnel and movements. He must be licensed as such by the Steamboat Inspection Service of the United States Department of Commerce (R. S. § 4426; U. S. C., Title 46, § 404). With certain minor exceptions, no person may receive such a license who has not served at least three years in the deck department of a steam vessel (Rules and Reg., Board of Supervising Inspectors of the Steamboat Inspection Service, March 2, 1931, Rule V, Sec. 34). In addition to qualification by experience, a pilot must also satisfy the Steamboat Inspection Service as to his knowledge and skill and be found to be trustworthy and faithful (R. S. § 4442; U. S. C., Title 46, § 214). In order to obtain an extension of route beyond the limits prescribed in his existing license, a pilot must pass a further written examination at the hands of the local inspectors having jurisdiction (Act of Oct. 22, 1914, c. 334, 38 Stat. 765; Rules and Reg., *supra*, Rule V, Sec. 35). In various other respects peculiar to his special functions, a pilot is subject to strict regulation (See, Rules and Reg., *supra*, Rule V, Secs. 1-25, 34-37, incl., and statutes there cited).

11. Each of respondent's ferries carries one engineer, whose main responsibility while the ferry is under way is that of operating the engines under signals from the pilot. In addition, he is responsible for the maintenance and repair of the engines, as well as all other mechanical equipment. The engineer is an officer (R. S. § 4131;

U. S. C. Title 46, § 221) and must be licensed as such by the Steamboat Inspection Service (R. S. § 4426; U. S. C., Title 46, § 404). No applicant for a license as third assistant engineer of a steam ferry, the lowest rank provided for by the Rules and Regulations of the Steamboat Inspection Service, may receive such a license unless he has had:

“First. Three years’ service in the engine department of steam vessels, or,

“Second. One year’s service as stationary engineer, together with one year’s service in the engine department of steam vessels, or,

“Third. Two years’ service as an apprentice to the machinist trade and engaged in the construction and repair of marine, stationary, or locomotive engines, together with one year’s service in the engine department of steam vessels.” (Rule V, Sec. 43.)

Corresponding requirements are imposed for a similar position on motor vessels (Rule V, Sec. 51).

In addition to qualifications of experience, the applicant for an engineer’s license must satisfy the examining inspectors that “his character, habits of life, knowledge and experience in the duties of an engineer are all such as to authorize a belief that he is a suitable and safe person to be intrusted with the powers and duties of such a station”, and it is the duty of the inspectors to suspend or revoke the license upon satisfactory proof of “negligence, unskillfulness, intemperance, or willful violation” of applicable laws of Congress, and specifically to revoke the license upon proof that the holder has permitted the boilers in his charge to “become in bad condition” or “that he has not kept his engine and machinery in good working order . . . ” (R. S. § 4441; U. S. C., Title 46, § 229). No license is granted for a longer period than five years and may be renewed at expiration only upon further examination (R. S. § 4441, *supra*).

By various other Acts of Congress and rules of the Steamboat Inspection Service, engineers are subject to strict regulation in the exercise of their peculiar duties and responsibilities. (See, Rules and Reg., *supra*, Rule V, Secs. 1, 2, 4, 5, 8, 9, 10, 12, 14, 39–50 incl., and various Acts of Congress there cited.)

12. The remaining employees carried in service on each of respondent’s ferries consist of a quartermaster, two deck-hands and a fireman or oiler. None of these employees need be licensed, and they are commonly referred to as unlicensed personnel. The quartermaster assists the pilot, principally in actual navigation. The duties of the deck-hands are discernible from their name. The fireman and oilers work under the direction of the engineers in the actual

operation, maintenance and repair of the engine-room and other mechanical equipment, the fireman on steam ferries and the oilers on the one Diesel-motor ferry operated by respondent.

13. There exist among employees of the ferry service or industry along the Delaware River three labor organizations, whose respective jurisdictions correspond to the three general classes of respondent's employees. One, the National Organization of Masters, Mates and Pilots of North America, admits only pilots; The National Marine Engineers' Beneficial Association, represented in this area by the subordinate Association, admits only the licensed engineers; and the Harbor Boatmen's Union admits only unlicensed personnel.

14. The qualifications, responsibilities and duties of the licensed engineers differ in kind from those of pilots, quartermasters and deck-hands, and in the same respects differ in marked degree from those of firemen and oilers. Those differences serve to identify the engineers as a class or group distinct from all other employees of respondent.

15. The licensed engineers employed by respondent in the capacity of engineers constitute a unit appropriate for the purpose of collective bargaining. At all times hereinafter mentioned, such engineers were twelve in number.

III. THE RESPONDENT AND THE ASSOCIATION

16. On or before August 2, 1935, eleven of such engineers signed and delivered to Warren C. Evans, Financial Secretary and Business Manager of the Association, cards stating as follows:

"I hereby authorize the National M. E. B. A. to represent me in negotiating wage scales and working conditions, as provided in the Wagner-Connery Labor Disputes Bill."

At that time, the twelfth engineer was and for a substantial preceding period had been a member in good standing of the Association, and three of the remaining eleven engineers had become members not later than the end of August, 1935. The authorizations and membership in the Association were matters of discussion between Evans and various of the twelve engineers during the months of July and August, 1935.

17. On August 7, 1935, Evans, as Business Manager of the Association, transmitted to L. H. Garrison, the General Manager of the respondent, a letter stating:

"Under date of May 23, 1935, I asked that you grant a conference for the purpose of negotiating an agreement covering wages, hours, and working conditions of the engineers employed by your company. This request has been ignored.

"In accordance with the provisions of the National Labor Relations Act, I am authorized to represent all the engineers employed by your company for the purpose of collective bargaining.

"I hereby renew my request for a conference for the purpose of negotiating an agreement covering wages, hours, and working conditions for the engineers employed by your company and ask that such conference be set at the earliest convenience."

Under date of August 9, 1935, Garrison replied to Evans as follows:

"Your letter of the 7th instant received relative to a conference.

"Wish to advise I will be here Friday the 16th and Saturday the 17th as far as I know now, but give me a call before you come down. Call Wilson Line at Philadelphia Lombard 7640 and ask for me."

18. As a result of this exchange of correspondence a meeting between Evans and Garrison took place on August 23, 1935, at the latter's office in Wilmington, Delaware. At this meeting Evans again stated that he was authorized to represent the licensed engineers in the employ of respondent for the purpose of collective bargaining, and presented a draft of agreement containing proposals concerning the wages, hours and working conditions of all such licensed engineers. The draft agreement so presented was a revision of a prior draft whose provisions Evans had discussed with certain of the engineers concerned.

19. At the conference on August 23, 1935, Garrison told Evans that the respondent could see no reason why it should negotiate with him, as all of its negotiations theretofore had been carried on with its men, and that the respondent wanted to continue dealing in that fashion. To this Evans replied that under the National Labor Relations Act any one representing a majority of employee groups was authorized to negotiate in their behalf. Garrison then expressed a lack of familiarity with the Act and a desire to have a copy of it. Evans thereupon gave Garrison a copy, and the conference ended with Garrison's statement that he would "take up" the agreement and advise Evans of the respondent's position at a later date.

20. Neither at this conference nor at any earlier or later date in his negotiations with Evans did Garrison deny or question the authority of Evans to represent the employees concerned.

21. On or about September 27, 1935, Garrison advised Evans in a telephone conversation that the respondent had "decided not to negotiate but to await the outcome of the Supreme Court decision on the law", stating that in the opinion of the respondent the law

was unconstitutional. Garrison had theretofore discussed the matter with Mr. Junkin, the president of respondent, and had transmitted to Junkin the proposed agreement presented by Evans. The decision communicated by Garrison to Evans was made by Junkin.

CONSIDERATION OF RESPONDENT'S OBJECTIONS

At various stages of the case the respondent has made and preserved objections, with which we will now deal.

I. OBJECTIONS TO JURISDICTION

At the hearing, the Trial Examiner overruled respondent's motion to dismiss the complaint, a motion predicated upon the following constitutional grounds: That the Act violates the Tenth Amendment in purporting to regulate matters reserved to the States; that it violates the Fifth Amendment by depriving the respondent of freedom of contract; that it violates the Seventh Amendment by depriving respondent of trial by jury; and violates Article III by conferring judicial power upon an administrative board in the executive branch of the government. We have given these objections every consideration consistent with our functions under the law, and overrule them.

In connection with the objection under the Tenth Amendment, our finding that respondent is engaged in and is an instrumentality of interstate commerce merits some further exposition in view of the contention of respondent that, since the slips to and from which its ferries proceed are entirely in Delaware waters, it is not engaged in such commerce. In the case of *The Daniel Ball*, 77 U. S. (10 Wall.) 557, the Supreme Court held that a steamer transporting passengers and merchandise between points and over a course entirely within the State of Michigan was nevertheless an instrument of and engaged in commerce among the states because she was employed in transporting "goods destined for other states, or goods brought from without the limits of Michigan to places within that State" (p. 565). *The Daniel Ball* was cited with approval by the Supreme Court in its decision in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548, upholding the Railway Labor Act of 1926.

In addition, respondent urged in its motion to dismiss that Sections 8 (5) and 9 (a) of the Act violate the Fifth and Tenth Amendments. In the absence of specification we take it that respondent's objection to these sections is directed to the "majority rule" which they establish for the conduct of collective bargaining negotiations. But no question of majority representation is present in this case, in view of the fact that the Association represents every employee in the unit defined in the complaint and in view of our finding that

that unit is one appropriate for the purposes of collective bargaining. Our findings as to representation and the unit involve overruling objections of the respondent, to which we will now advert.

II. OBJECTIONS TO REPRESENTATION AND THE UNIT

The respondent questions the authority of the Association on the ground that the cards signed by eleven of the men involved referred to the national organization and not to the Association. This objection cannot be said to come with full grace since the ground of the respondent's refusal to bargain with the Association clearly implies unwillingness to deal with its parent organization as well. Fundamentally, however, the question concerned not the respondent but the national and its local associations. The national association has not questioned the authority of its subordinate, and, not having done so, we do not believe that the respondent may raise this question.

Aside from that aspect of the matter, the proof shows that the Association was the agency intended. The cards were distributed by Evans, signed as a result of his efforts and returned to him. Evans was engaged in this and related activity as Business Manager of the Association. His activities as such official were but steps incidental to instituting and carrying on collective bargaining negotiations with the respondent. In the draft agreement which he discussed with the signers of the cards and later presented to the respondent, "Marine Engineers' Beneficial Association, No. 13" is specified as the party to execute the agreement in behalf of the employees. Furthermore, a number of the engineers who signed the cards were or shortly thereafter became members of No. 13. Nowhere in the record is there any evidence that the national organization, as opposed to the local, was expected to represent the men.

Finally, to the extent that the objection made is based upon the technical rule of evidence in courts of law that the terms of a written instrument may not be varied by parol evidence, we are of the opinion that, in view of that provision of Section 10 (b) of the Act which states that in proceedings before this Board "the rules of evidence prevailing in courts of law or equity shall not be controlling", the parol evidence rule should not bar us from attributing to the signers of the cards the intention which the surrounding circumstances otherwise appear to require.

With respect to the unit, respondent has excepted to the finding of the Trial Examiner that the engineers are an appropriate unit for the purposes of collective bargaining with it. As the exception taken is in general terms, it will be met by a statement of the more important considerations which, in our judgment, warrant the finding.

It is clear that, so far as the pilots and engineers are concerned, such wide differences in authority, experience, responsibility and duty prevail that a separation of engineers from the pilots for the purposes of collective bargaining is warranted. And the same is true, for like reasons, of a separation of the engineers from the quartermasters and deck-hands.

The engineers are, likewise, properly differentiated from the firemen and oilers. An engineer is an officer, licensed to act as such by the United States Government. To obtain the license he must exhibit substantial attainments in experience, skill and character. These attainments, visible and significant, are not required of his assistants, the firemen and oilers. And while the duties and responsibilities of the engineer and his assistants both relate to the engine-room or mechanical department, those of the first are of command, the latter of execution. Nor have the fireman and oilers made any claim that they should be grouped with their superiors.

III. OBJECTIONS TO EVIDENCE

Respondent objected to the introduction in evidence of a copy of the draft of agreement submitted by Evans to the respondent, on the ground that it was irrelevant. The proposed agreement was relevant and properly admitted.

Respondent objected also to the introduction of compilations of data prepared by the Bureau of Labor Statistics of the United States Department of Labor and certified by Isador Lubin, Commissioner of Labor Statistics, and by the Secretary of Labor (Board Exhibits B-8 and B-9), on the ground that the right to cross-examine was denied. Exhibit B-8 shows the total number of strikes and lock-outs in the water transportation industry from August, 1934 to July, 1935, inclusive, together with the number of workers involved and man-hours of idleness caused thereby. Exhibit B-9 is a breakdown of the strikes and lock-outs referred to in Exhibit B-8, by causes, showing that slightly more than one-half of all strikes and lock-outs, workers and man-days of idleness during the period in question were concerned with "Organization" disputes, that is, disputes over union recognition, collective bargaining, discrimination, and the like. While we think that such evidence is admissible, the Exhibits in question are not necessary to sustain jurisdiction in this case.

The respondent further objected to certain testimony and exhibits concerning the extent of the flow of highway traffic over, and in the area immediately surrounding, respondent's ferry crossings, on the ground that this evidence was irrelevant or immaterial. Certainly this evidence bearing upon the need for and use of respondent's facilities, was both relevant and material. In the face of the proof given of the precise number of vehicles transported by the respond-

ent in the last five and one-half years, the evidence was not highly significant, but it nevertheless served a proper purpose in helping establish the general setting in which respondent's operations are conducted.

Other objections were interposed by respondent to certain lines of examination. We have given no consideration to the testimony designed to show that the respondent paid its engineers less than neighboring ferry companies, that their inferior level of wages was a source of dissatisfaction to them, and that higher wages were paid where collective bargaining prevailed. We need not, therefore, pass upon the merits of these objections. None of the other objections merit discussion.

CONCLUDING FINDINGS OF FACT

In addition to the findings of fact previously stated, upon the entire record in the case, the following concluding findings of fact are made by the Board:

1. The respondent, Delaware-New Jersey Ferry Company, is engaged in the interstate transportation of persons and property by ferry-boats operated on the Delaware river between the cities of New Castle, Delaware, and Pennsville, New Jersey, and between the cities of Wilmington, Delaware, and Pennsgrove, New Jersey.

2. In the operation of its said ferry-boats, respondent employs twelve persons assigned as engineers whose functions are to supervise the operation, maintenance, and repair of the engines and mechanical equipment of the boats. Each such engineer is required to be, and is, licensed for such position by the Steamboat Inspection Service of the United States Department of Commerce.

3. The services performed by the engineers described in paragraph 2 above are performed in and upon instrumentalities of transportation among the states during the operation of such instrumentalities in such transportation, and said engineers and their services are an integral part of the operation of such instrumentalities in such transportation.

4. The said engineers constitute an appropriate unit for the purposes of collective bargaining.

5. Prior to September 27, 1935, each and all of the said engineers designated or authorized Marine Engineers' Beneficial Association No. 13 as his and their representative for the purposes of collective bargaining with respondent, Delaware-New Jersey Ferry Company.

6. Pursuant to such designation or authorization, Marine Engineers' Beneficial Association No. 13, by Warren C. Evans, its Financial Secretary and Business Manager, requested of respondent, Delaware-New Jersey Ferry Company, that it confer with said Association for the purpose of negotiating an agreement concerning the

rates of pay, wages, hours of employment and other conditions of employment of the said engineers.

7. On September 27, 1935, respondent, Delaware-New Jersey Ferry Company, declined said request and refused to confer with said Association for the purpose of negotiating an agreement concerning the rates of pay, wages, hours of employment and other conditions of employment of the said engineers.

8. The aforesaid acts of respondent, Delaware-New Jersey Ferry Company, occurred and are occurring in commerce among the states.

CONCLUSION OF LAW

Upon all findings of fact hereinabove made, and upon the entire record in the proceeding, the Board finds and concludes as a matter of law that respondent, Delaware-New Jersey Ferry Company, by refusing to bargain collectively with Marine Engineers' Beneficial Association No. 13, as the representative of all of the licensed engineers employed in that capacity by said respondent, has engaged and is engaging in an unfair labor practice affecting commerce within the meaning of Section 8, subdivision (5), and Section 2, subdivisions (6) and (7), of the National Labor Relations Act.

ORDER

On the basis of its findings of fact and conclusion of law and acting pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board orders that respondent, Delaware-New Jersey Ferry Company, its officers and agents, shall cease and desist from refusing to bargain collectively with Marine Engineers' Beneficial Association No. 13 as the exclusive representative of the licensed engineers employed in such capacity by respondent in respect to rates of pay, wages, hours of employment and other conditions of employment.