

In the Matter of SIMMONS COMPANY and FOREMEN'S ASSOCIATION OF
AMERICA, CHAPTER #54

Case No. 2-C-6244.—Decided August 26, 1946

Mr. William T. Little, for the Board.

Mr. Raymond E. Hackett, of Stamford, Conn., for the respondent.

Mr. Peter Willig, of Newark, N. J., for the Association.

Mr. Herbert C. Kane, of counsel to the Board.

DECISION

AND

ORDER

On June 21, 1946, Trial Examiner David Rein issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent and the Board's Trial Attorney filed exceptions to the Intermediate Report. On August 6, 1946, the Board, at Washington, D. C., held oral argument in which the respondent participated; the Association submitted a statement in lieu of oral argument.

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the contentions advanced at the oral argument and in the Association's Statement, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.¹

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations

¹ On July 8, 1946, the respondent filed with the Board a Motion to Dismiss Complaint and a Motion For Stay of Proceedings. These motions are hereby denied.

Board hereby orders that the respondent, Simmons Company, Elizabeth, New Jersey, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Foremen's Association of America, Chapter #54, as the exclusive representative of all general foremen, general inspection foremen, foremen, inspection foremen and foreladies in the production and maintenance departments of the respondent's Elizabeth, New Jersey, plant, excluding assistants to department superintendents and all other supervisors above the rank of general foremen, in respect to rates of pay, wages, hours of employment, or other conditions of employment;

(b) In any manner interfering with the efforts of Foremen's Association of America, Chapter #54, to bargain collectively with it.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Foremen's Association of America, Chapter #54, as the exclusive representative of all its employees in the aforesaid bargaining unit, in respect to rates of pay, wages, hours of employment, or other conditions of employment;

(b) Post at its Elizabeth, New Jersey, plant, copies of the notice attached to the Intermediate Report, marked "Appendix A."² Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Second Region, in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

MR. GERARD-D. REILLY, dissenting:

For the reasons stated in my dissenting opinion in *Matter of Packard Motor Car Company*,³ I am constrained to dissent from the majority opinion in this case.

INTERMEDIATE REPORT

Mr. William T. Little, for the Board.

Mr. Raymond E. Hackett, of Stamford, Conn., for the Respondent.

Mr. Peter Willig, of Newark, N. J., for the Association.

² This notice, however, shall be, and hereby is, amended by striking from the first paragraph thereof the words, "The Recommendations of a Trial Examiner," and substituting in lieu thereof the words, "A Decision and Order."

³ 64 N L R. B. 1212, 1217.

STATEMENT OF THE CASE

Upon an amended charge duly filed by Foremen's Association of America, Chapter #54, herein called the Association, the National Labor Relations Board, herein called the Board, by its Regional Director for the Second Region (New York, New York), issued its complaint dated May 10, 1946, against Simmons Company, 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 Association.

With respect to the unfair labor practices, the complaint alleged in substance that the respondent, on or about April 1, 1946, and at all times thereafter, refused to bargain collectively with the Association as the exclusive bargaining representative of the respondent's employees within an appropriate bargaining unit, although a majority of the employees in such unit in an election conducted under the supervision of the Board on March 4, 1946, had designated and selected the Association as their representative for the purposes of collective bargaining, thereby interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act. The respondent thereafter filed its answer in which it admitted that it had, on or about April 1, 1946 and at all times thereafter, refused to bargain collectively with the Association as the exclusive representative of the employees in the unit described in the complaint. The respondent denied, however, that such unit was appropriate for the purpose of collective bargaining or that the Association was the exclusive representative of all the employees in said unit for the purposes of collective bargaining. The respondent further denied that it had engaged in any unfair labor practices within the meaning of the Act. The respondent also filed a motion to dismiss the complaint on the ground that the foremen involved in this case do not constitute an appropriate unit for the purposes of collective bargaining and are not employees within the meaning of the Act, and on the further ground that employment conditions and relationships between the respondent and its foremen and foreladies were substantially different from those at the hearing in the representation proceeding before the Board. This motion was subsequently denied by the Trial Examiner at the hearing on the complaint.

Pursuant to notice, a hearing was held on May 28, 1946, at New York City before the undersigned, the Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented at the hearing by counsel and the Association by its Regional Director. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties.¹ At the close of the Board's case the motion of counsel for the Board to conform the pleadings to the proof was granted without objection. At the close of the hearing the respondent renewed its motion to dismiss the complaint, which motion was denied by the undersigned. The parties did not avail themselves of the opportunity afforded them to present oral argument before, or to file briefs with, the undersigned.

¹ Counsel for respondent offered in evidence a previous decision of the Board involving the respondent. The undersigned rejected the offer but stated he would take judicial notice of the decision. This decision is reported at 54 N. L. R. B. 130.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Simmons Company, a Delaware corporation with its principal office and place of business in New York City, maintains a branch office and factory in Elizabeth, New Jersey. At this plant it is engaged in the manufacture, sale, and distribution of bedding and furniture. During the year ending April 30, 1946, the respondent caused to be delivered to its plant at Elizabeth, New Jersey, steel, cotton, textiles, and other materials valued in excess of \$1,000,000, of which approximately 90 percent was shipped from points outside the State of New Jersey. During the same period, approximately 90 percent of the products manufactured at this Elizabeth, New Jersey, plant valued in excess of \$1,000,000, was shipped to points outside the State of New Jersey.

At the hearing the respondent conceded that it was engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

Foremen's Association of America, Chapter #54, is a labor organization admitting supervisory employees of the respondent into membership.

III. THE UNFAIR LABOR PRACTICES

A. *The refusal to bargain*

- 1 The appropriate unit and representation by the Association of a majority therein

On February 11, 1946, the Board issued a Decision and Direction of Election in Case No 2-R-5626,² finding that all general foremen, general inspection foremen, foremen, inspection foremen and foreladies in the production and maintenance departments of the respondent's Elizabeth, New Jersey plant, excluding assistants to the department superintendents and all other supervisors above the rank of general foremen, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

On March 4, 1946, pursuant to said Direction of Election, an election by secret ballot was conducted under the supervision of the Regional Director for the Second Region.³ On March 19, 1946, the Board certified the Association as the exclusive representative, for the purposes of collective bargaining, of the employees in the unit hereinabove described.

The respondent contends, as it did at the representation proceeding, that the unit as found by the Board was not an appropriate unit since the supervisors included within the unit were not employees within the meaning of the Act. This contention was considered by the Board in a previous representation proceeding and it was resolved against the views of the respondent. Accordingly, the undersigned will not review this contention *de novo*.⁴

The respondent also introduced evidence to show that its plant at Elizabeth, New Jersey, had reconverted from the production of war products to civilian

² 65 N. L. R. B. 984

³ The tally of ballots showed that of approximately 32 eligible voters, 31 votes were cast, 30 of which were cast for the Association and 1 was challenged.

⁴ *Matter of Swift and Company*, 63 N. L. R. B. 718.

products. It contended that this reconversion resulted in a change in the relationship between the respondent and its supervisory employees. However, none of the evidence introduced by the respondent supports this contention. There has been no substantial change in the relationship between the respondent and its foremen or in the nature of the duties of the foremen, certainly no circumstances that would warrant a different finding as to the appropriate unit. The evidence establishes at most that the foremen have a slightly greater degree of responsibility today than they had at the time of the representation case. The Board has held that such minor variations in degrees of responsibility will not alter its conclusions that foremen constitute an appropriate unit.⁶

Accordingly, the undersigned finds that all general foremen, general inspection foremen, foremen, inspection foremen and foreladies in the production and maintenance departments of the respondent's Elizabeth, New Jersey, plant, excluding assistants to department superintendents and all other supervisors above the rank of general foremen, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act. The undersigned further finds that on and at all times after March 19, 1946, the Association was the duly designated bargaining representative of a majority of the employees in the aforesaid bargaining unit and that pursuant to the provisions of Section 9 (a) of the Act the Association was on March 19, 1946, and at all times thereafter has been and now is the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

2. The refusal to bargain

On March 22, 1946, the Association wrote to the respondent requesting a meeting for collective bargaining purposes. A meeting was subsequently held on April 1, 1946, between representatives of the Association and Mr. Chaffe, Works Manager of the respondent. At this meeting the representatives of the Association requested recognition for the Association as exclusive bargaining agent. In reply, Mr. Chaffe read a letter which had been prepared by counsel for the respondent. This letter recited that the respondent would not recognize the Board certification and that the respondent contended that the Board had no jurisdiction over the matter. The letter further stated that the respondent would not recognize the Association as the bargaining representative for any of its supervisory employees because it considered that supervisors were not employees within the meaning of the Act.

At the hearing, the respondent admitted its refusal to bargain with the Association and made the same contentions set forth above. The respondent made the further contention that it was not required to bargain with the Association because of the change in circumstances since the date of the representation hearing. Both of these contentions have already been discussed in this report. It is clear that the respondent's conduct constituted a refusal to bargain and the undersigned so finds.

The undersigned finds that the respondent on April 1, 1946, and at all times thereafter has refused to bargain collectively with the Association as the exclusive representative of its employees in an appropriate unit and has thereby interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

⁶ *Matter of L. A. Young Spring & Wire Corporation*, 65 N. L. R. B. 298.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondent set forth in Section III, above, occurring in connection with the operations of the respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Since it has been found that the respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Because of the basis of the respondent's refusal to bargain as indicated in the facts found, and because of the absence of any evidence that danger of other unfair labor practices is to be anticipated from the respondent's conduct in the past, the undersigned will not recommend that the respondent cease and desist from the commission of any other unfair labor practices. Nevertheless, in order to effectuate the policies of the Act, the undersigned will recommend that the respondent cease and desist from the unfair labor practices found and from in any manner interfering with the efforts of the Association to bargain collectively with it.⁶

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

CONCLUSIONS OF LAW

1. Foremen's Association of America, Chapter #54, is a labor organization within the meaning of Section 2 (5) of the Act.

2. All general foremen, general inspection foremen, foremen, inspection foremen and foreladies in the production and maintenance departments of the respondent's Elizabeth, New Jersey, plant, excluding assistants to department superintendents and all other supervisors above the rank of general foremen, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. Foremen's Association of America, Chapter #54, was on March 19, 1946, and at all times thereafter has been the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing on April 1, 1946, and at all times thereafter to bargain collectively with Foremen's Association of America, Chapter #54, as the exclusive representative of all its employees in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

⁶ See *N. L. R. B v Express Publishing Company*, 312 U. S. 426.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the respondent, Simmons Company, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Foremen's Association of America, Chapter #54, as the exclusive representative of all general foremen, general inspection foremen, foremen, inspection foremen and foreladies in the production and maintenance departments of the respondent's Elizabeth, New Jersey, plant, excluding assistants to department superintendents and all other supervisors above the rank of general foremen;

(b) In any manner interfering with the efforts of Foremen's Association of America, Chapter #54, to bargain collectively with it.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Foremen's Association of America, Chapter #54, as the exclusive representative of all its employees in the aforesaid appropriate unit;

(b) Post at its plant at Elizabeth, New Jersey, copies of the notice attached to the Intermediate Report herein marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) File with the Regional Director for the Second Region, on or before ten (10) days from the date of the receipt of this Intermediate Report, a report in writing setting forth in detail the manner and form in which the respondent has complied with the foregoing recommendations.

It is further recommended that unless on or before ten (10) days from the receipt of the Intermediate Report the respondent notifies said Regional Director in writing that it has complied with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended effective November 27, 1945, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceedings (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of the order transferring the case to the Board. Any party desiring to submit a brief in support

of the Intermediate Report shall do so within fifteen (15) days from the date of the entry of the order transferring the case to the Board, by filing with the Board an original and four copies thereof, and by immediately serving a copy thereof upon each of the other parties and the Regional Director.

DAVID REIN,
Trial Examiner.

Dated June 21, 1946.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not in any manner interfere with the efforts of Foremen's Association of America, Chapter #54, to bargain collectively with us.

We will bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All general foremen, general inspection foremen, foremen, inspection foremen and foreladies in the production and maintenance department at the Elizabeth, New Jersey, plant, excluding assistants to department superintendents and all other supervisors above the rank of general foreman.

SIMMONS COMPANY,
Employer.

By _____
(Representative) (Title)

Dated _____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.