

In the Matter of FEDDERS MANUFACTURING COMPANY, INC. and  
AMALGAMATED ASSOCIATION OF IRON, STEEL & TIN WORKERS OF  
N. A., LODGE 1753

*Case No. C-621.—Decided June 9, 1938*

*Automobile and Refrigeration Parts Manufacturing Industry—Interference, Restraint, and Coercion—Collective Bargaining:* refusal to recognize representatives, as exclusive representative, after Certification by Board; special form of remedial order; recognition as exclusive representative—*Election:* run-off; nature of; notice to other parties of request for, unnecessary; choice of place of holding; company representatives, presence at: matter for discretion of Regional Director; contention that first election concluded proceedings, held without merit—*Representatives:* eligibility to participate in choice: persons on "available" list—*Employee Status:* persons on "available" list, held to be employees.

*Mr. Peter J. Crotty*, for the Board.

*Mr. John W. Van Allen*, of Buffalo, New York, for the respondent.

*Mr. Martin Kurasch*, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon charges duly filed by Amalgamated Association of Iron, Steel & Tin Workers of N. A., Lodge No. 1753, herein called the Amalgamated, the National Labor Relations Board, herein called the Board, by Henry J. Winters, Regional Director for the Third Region (Buffalo, New York), issued its complaint, dated April 6, 1938, against Fedders Manufacturing Company, Inc., Buffalo, New York, herein called the respondent. The complaint and notice of hearing thereon were duly served upon the respondent and the Amalgamated.

The complaint alleged 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.

On April 15, 1938, the respondent filed its answer to the complaint denying that its operations affected interstate commerce within the meaning of the Act and that it had engaged in or was engaging in the alleged unfair labor practices.

Pursuant to the notice and amendment thereto, a hearing was held in Buffalo, New York, on April 20, 1938, before Mark DeWolfe Howe, 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 introduce evidence bearing upon the issues was afforded to the parties.

During the course of the hearing the Trial Examiner made several rulings on motions and objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed.

On May 9, 1938, the respondent filed a brief in support of its contentions in the case. On May 13, 1938, the Trial Examiner duly filed his Intermediate Report. He found that the respondent had engaged in the unfair labor practices alleged in the complaint. On May 23, 1938, the respondent filed its Exceptions to the Intermediate Report, excepting to the findings of fact made by the Trial Examiner and to his conclusions and recommendations. The respondent did not request oral argument upon its Exceptions to the Intermediate Report. We have fully considered the Exceptions to the Intermediate Report, but, save for those exceptions which are consistent with the findings, conclusions, and order set forth below, we find them to be without merit.

On May 13 the respondent filed a "motion to set aside complaint, withdraw certification of representatives, nullify results of run-off election, withdraw supplemental decision and direction of election, dismiss petition for run-off election, and certify that neither union is exclusive bargaining agent of respondent's employees." That motion is hereby denied.

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

#### FINDINGS OF FACT

##### 1. THE BUSINESS OF THE RESPONDENT

The respondent, located at Buffalo, New York, manufactures automobile radiators, electric refrigeration parts, air-conditioning parts and appliances, heat transfer appliances, and electric water coolers. In the manufacture of these various products the company uses copper, brass, steel, tin, lead, and small amounts of numerous other

items. It purchases fabricated copper from fabricating mills located at Buffalo and Rome, New York, Cleveland, Ohio, Detroit, Michigan, and Bridgeport, Connecticut.

In the year 1936 the company purchased \$2,428,567.52 worth of copper and brass, of which \$300,000 worth was purchased outside the State of New York; for the period of January 1, 1937, to July 31, 1937, the value of brass and copper purchased was \$1,738,574.63, of which \$265,000 worth was purchased outside of New York. In 1936 the company bought \$186,370.27 worth of steel and from the period of January 1, 1937, to July 31, 1937, bought \$140,522.01 worth of steel. All of the steel comes from States other than New York. All of the tin is likewise purchased from States other than New York. The company buys the tin, lead, and other materials that are used to make up solder and gives them to the fabricator or smelterer in the quantities required by the various formulae for solder. All of these fabricators are outside of New York. In 1936 the company purchased \$575,648.06 worth of solder and from January 1, 1937, to July 31, 1937, the value of solder purchased was \$405,864.90.

The company has branch warehouses in Massachusetts, Georgia, Ohio, Michigan, Illinois, Texas, and California. Sales offices are maintained at each of these warehouses.

Most of the automobile radiators manufactured by the company are sent to Michigan, Indiana, and California. Some are exported. The air-conditioning parts are shipped through the manufacturing and jobbing trade to Michigan, Ohio, Pennsylvania, Georgia, Texas, California, Missouri, and Illinois. Some are sold to purchasers in New York. Unit heaters are sold through the jobbing and contracting trade all over the country. Electric water coolers are shipped to various parts of the United States. From January 1, 1936, to July 31, 1937, the total sales of the company were \$10,139,616.82. About 90 per cent of this total represents shipments to points outside New York. Outgoing shipments are made by rail. The incoming shipments are generally made by truck.

The company has registered stock issues with the Securities & Exchange Commission for sale in interstate commerce and has registered a trade-mark with the United States Patent Office for sale of articles in interstate commerce.

In recent months the quantities mentioned and the activities described have been reduced by approximately 50 per cent.

## II. THE ORGANIZATION INVOLVED

Lodge No. 1753, Amalgamated Association of Iron, Steel & Tin Workers of N. A. is a labor organization, affiliated with the Com-

mittee for Industrial Organization, which admits to membership the production employees of the Fedders Manufacturing Company, Inc. Lodge No. 1753 was chartered on May 5, 1937.

### III. THE UNFAIR LABOR PRACTICES

Pursuant to a petition for investigation and certification of representatives under Section 9 (c) of the Act duly filed by the Amalgamated, and after a hearing held on August 30, 1937, the Board issued a Decision,<sup>1</sup> dated October 15, 1937, in which it found that all the production employees of the respondent, excluding foremen, assistant foremen, and others in supervisory capacities, office workers, janitors, porters, shipping clerks, department clerks, clerks under foremen in the shop, engineers, draftsmen, nurses, watchmen, and all other salaried employees, and excluding the repairman in the Detroit, Michigan, warehouse, but including the stockroom helper, constituted a unit appropriate for the purposes of collective bargaining. The Board directed that an election by secret ballot be held among the employees in the appropriate unit who appeared on the pay-roll list of July 11, 1937, to determine whether they desired to be represented by the Amalgamated, or the Employees' Labor Organization of the Fedders Manufacturing Company, herein called the E. L. O., for the purposes of collective bargaining, or by neither. In the election, a majority of the employees in the appropriate unit indicated a desire to bargain collectively with the respondent, although they accorded neither of the rival unions a majority.<sup>2</sup> The Board directed, after request by the Amalgamated, which had received the greater number of votes, that a run-off election be held among the employees in the appropriate unit to determine whether or not they desired to be represented by the Amalgamated for the purposes of collective bargaining. A majority of the employees did indicate such a desire, and the Board certified the Amalgamated on February 12, 1938.<sup>3</sup>

On February 19, 1938, the Amalgamated, by letter addressed to the respondent, requested a conference with representatives of the respondent for "purposes of discussing a potential contract covering wages, hours and working conditions for the employees of the Fedders Manufacturing Company." The respondent replied by a letter dated March 12, 1938, in which it stated that its counsel has "serious legal doubts as to the validity of the procedure under

<sup>1</sup> 3 N. L. R. B. 818.

<sup>2</sup> Of the 814 employees who voted, 400 voted in favor of the Amalgamated, 369 voted in favor of the E. L. O., and 41 ballots were cast in favor of neither. There were 4 challenged ballots.

<sup>3</sup> 5 N. L. R. B. 269.

which this certification was made," and that it would bargain with the Amalgamated only for its members. This refusal to bargain with the Amalgamated except for its own members, after the Amalgamated had been certified as the exclusive bargaining representative of all the employees in the appropriate unit, constitutes on its face an unfair labor practice within the meaning of Section 8 (5), of the Act. The respondent contends, however, that the Certification was an invalid one and that there had, therefore, been no showing that the Amalgamated is the representative of the majority of the employees.<sup>4</sup>

The respondent asserts that it received no notice of the request by the Amalgamated for a run-off election and that there was no hearing prior to the run-off election, that the election was held at a place 1 mile from the plant, that the respondent was not permitted to have watchers at the election, and that the respondent was not given an opportunity for oral argument and submission of briefs in support of its objections to the Regional Director's Intermediate Report on the ballot after the run-off election. The respondent further contends that the first election closed the proceedings, that the proceedings were reopened ex parte, and that the Board has no authority to direct a run-off election.

When the Board ordered the investigation pursuant to the petition for investigation and certification of representatives, the respondent was notified and a full hearing was held, at which the respondent was represented by counsel, and at which time two of the respondent's vice presidents and its industrial relations manager testified. During the hearing evidence was introduced which bore on the subjects of the appropriate unit, the existence of a question affecting commerce concerning the representation of employees, and the pay-roll date to be used in the election. Having determined the appropriate unit, the most suitable pay-roll date, and the fact that a question affecting commerce did exist, the Board then proceeded in its investigation and sought to determine whether or not either of the contending unions could be certified as the exclusive bargaining agency for the employees in the appropriate unit. To this end it directed an election among these employees, which resulted in a majority of the employees evincing a desire for collective bargaining although neither union received a majority of the votes cast.

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<sup>4</sup>The contentions of the respondent are indicated by its letters of January 21 and January 24 1938 to the Third Region of the Board, its objections to the Intermediate Report on the ballot in the run-off election, its answer to the complaint in the instant case, the brief filed with the Board on May 9, 1938, its objections to the Intermediate Report in the instant case its motion to set aside the complaint, etc, filed May 23, 1938, and its statement of authorities and points in support thereof

Finding that a majority of the employees in the appropriate unit desired to bargain collectively, the Board ordered a run-off election in an attempt to determine whether or not the employees in that majority would, on further consideration, unite on a single bargaining agency. The single agency selected for the ballot was that which had received a larger portion of the votes of those who had indicated that they favored collective bargaining. The right of those who still preferred the E. L. O. as well as those who opposed both organizations to express their choice was, of course, preserved by the opportunity to vote "No" on the ballot in the run-off election.

The run-off election was as much the result of the hearing as was the original election. All the issues had been formulated and decided; no new issues had to be determined. The respondent, therefore, having participated in the hearing, has no basis for complaint in the fact that no new hearing was held or in the fact that it did not receive notice of the request by the Amalgamated for a run-off election. The Board had indicated that it would not continue its investigation without a request for a run-off election by the labor organization which had received the greater number of votes. As we have indicated in previous proceedings, we will not require an organization to take part in an election against its will. The procedure followed here was designed simply to ascertain that the organization affected was not opposed to the inclusion of its name on the run-off ballot. No purpose would have been served by having copies of the Amalgamated's request served upon any of the other parties.

We do not consider that the choice of a place to hold the election, which was 1 mile distant from the plant, was in any way an arbitrary or an unreasonable choice, as the respondent claims. We believe that no right of the respondent was in any way affected thereby.

In the Certification of February 12, 1938, it was stated that "full opportunity was accorded to all of the parties to this investigation to participate in the conduct of the secret ballot and to make challenges." Such a statement was erroneous; the respondent was not permitted to have a representative at the place of balloting for the purpose of making challenges. The Regional Director, after objection by the Amalgamated, reversed his earlier decision on the matter and did not permit the respondent to have representatives present at the election. The misstatement, however, did not relate to any material fact. The Regional Director may, when he thinks it consonant with the rights of the employees, permit nonsupervisory employees representing the employer to participate in the election, but this matter is one for the discretion of the Regional Director. We believe that his action in the instant case was not unreasonable or arbitrary.

The respondent also asserts that the denial of its request for oral argument and submission of briefs in support of its objections to the Intermediate Report on the ballot in the run-off election deprived it of substantial procedural rights. A certification, however, is not an order directed against the respondent, or which can in any way aggrieve the respondent. No action was initiated against the respondent until the complaint in this proceeding was served. The respondent had, at the hearing based upon the complaint, full opportunity to present evidence as to the validity of the Certification and the accuracy of the facts to which the Certification attests. The respondent has been served with an Intermediate Report by the Trial Examiner in the case and has filed Exceptions to the Trial Examiner's findings of fact and to his conclusions and recommendations. The respondent has not taken the opportunity offered it of requesting oral argument upon its Exceptions to the Intermediate Report. We conclude that the respondent was in no way deprived of any material procedural right.

As to the assertion that the first election closed the proceedings, there is nothing in the Act to support such a contention. The Board's procedure is fully within the authorization of Section 9 of the Act to "take a secret ballot of employees, or utilize any other suitable method to ascertain such representation."

The respondent also asserts that, while the eligible employees on the pay roll of July 11, 1937, numbered 873, and 731 persons voted in the run-off election, the number of persons in the appropriate categories who were on respondent's pay roll on the date of the Supplemental Decision,<sup>5</sup> when the run-off election was directed, was 306.

In the hearing of August 30, H. E. Rieckelman, a vice president of the respondent, stated that the number of employees on the pay roll varied. He testified that July 11 represented a period in the respondent's business which could be referred to as "an average busy season." The Board decided that the pay-roll date of July 11, 1937, was to be used in the original election.

Theodore C. Fedders, vice president and general manager of the respondent, testified at the hearing in the present proceeding that the respondent's business had a very decided downward slump in October or November 1937. He stated that the number of people on the respondent's pay roll on January 10, 1938, the date of the Supplemental Decision and Direction of Election, was 306. By the "pay roll" for any specific date, Fedders meant "only people who are working and are being paid for work at the time." The respondent also keeps an available list on which it puts employees

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<sup>5</sup> 4 N L R B 770.

who had been laid off and from which it recalls employees when more work is available. Employees on the available list are called back to work on a seniority basis and the respondent does not go outside that list in getting help unless the list is exhausted.

Fedders, too, emphasized the fact that the number of people on the respondent's pay roll (in the categories which constitute the appropriate unit) fluctuates. The number has, on occasion, gone below 306. The extent of the fluctuation may be seen in the fact that on December 31, 1937, 10 days before the Supplemental Decision, it was, approximately, only 217.

The respondent points to the disparity between the 873 on the pay roll of July 11, 1937, and the 306 working on January 10, 1938. We have already indicated that there are large fluctuations in small periods. The respondent kept all those laid off since July 11 on the available list and has bargained with the Amalgamated as to people on that list. Because of the constant fluctuation in the number of workers needed, the respondent continually gives work to people on the list, and it has made no distinction between employees whom it considers temporarily laid off and those whom it considers permanently laid off. From the facts in the record it must be concluded that the respondent has considered the list an active one. The number of persons on the available list, together with those persons actually working, constitute the employees of the respondent. This conclusion is strengthened by the fact that the respondent has bargained with the Amalgamated on the question of seniority with respect to putting people on the pay roll and discharging them from the pay roll.

Fedders stated that from time to time some of the men who had been laid off had gotten jobs elsewhere. Respondent's proof on that point, however, was tenuous. We find that the respondent's objections which are based on the pay-roll date furnish no reason for setting aside the certification of February 12, 1938.

We find that on March 12, 1938, the respondent refused to bargain collectively with the Amalgamated as the representative of its employees with respect to rates of pay, wages, hours of employment, and other conditions of employment, and thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

We find that the aforesaid activities of the respondent have a close, intimate, and substantial relation to trade, traffic, and com-

merce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

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

#### CONCLUSIONS OF LAW

1. Amalgamated Association of Iron, Steel & Tin Workers of N. A., Lodge No. 1753, is a labor organization within the meaning of Section 2 (5) of the Act.

2. All the production employees of the respondent, excluding foremen, assistant foremen and others in supervisory capacities, office workers, janitors, porters, shipping clerks, department clerks, clerks under foremen in the shop, engineers, draftsmen, nurses, watchmen, and all other salaried employees, and excluding the repairman at the Detroit, Michigan, office but including the stockroom helper, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. Lodge No. 1753, Amalgamated Association of Iron, Steel & Tin Workers of N. A. was on March 12, 1938, and at all times thereafter has been the exclusive representative of all the respondent's employees in such unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing and continuing to refuse to bargain collectively with the Amalgamated Association of Iron, Steel & Tin Workers of N. A., Lodge No. 1753, as the exclusive representative of the employees in the above-stated 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 refusing and continuing to refuse to bargain collectively with the Amalgamated Association of Iron, Steel & Tin Workers of N. A., Lodge No. 1753, as above-stated, and thereby 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.

#### ORDER

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that

the Fedders Manufacturing Company, Inc., Buffalo, New York, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Amalgamated Association of Iron, Steel & Tin Workers of N. A., Lodge No. 1753, as the exclusive representative of all its production employees, excluding foremen, assistant foremen and others in supervisory capacities, office workers, janitors, porters, shipping clerks, department clerks, clerks under foremen in the shop, engineers, draftsmen, nurses, watchmen, and all other salaried employees, and excluding the repairman at the Detroit, Michigan, office, but including the stockroom helper;

(b) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act.

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

(a) Upon request bargain collectively with the Amalgamated Association of Iron, Steel & Tin Workers of N. A., Lodge No. 1753, as the exclusive representative of all its production employees, excluding foremen, assistant foremen and others in supervisory capacities, office workers, janitors, porters, shipping clerks, department clerks, clerks under foremen in the shop, engineers, draftsmen, nurses, watchmen, and all other salaried employees, and excluding the repairman at the Detroit, Michigan, office, but including the stockroom helper, with respect to rates of pay, hours of employment and other conditions of employment;

(b) Post immediately notices to its employees in conspicuous places within the plant stating that respondent will cease and desist as aforesaid, and maintain such notices for a period of at least thirty (30) consecutive days from the date of posting;

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