

In the Matter of BENJAMIN FAINBLOTT AND MARGORIE FAINBLOTT, INDIVIDUALS, DOING BUSINESS UNDER THE FIRM NAMES AND STYLES OF SOMERVILLE MANUFACTURING COMPANY AND SOMERSET MANUFACTURING COMPANY and INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL No. 149.

Case No. C-53.—Decided June 3, 1936

Ladies Wearing Apparel Industries—Unit Appropriate for Collective Bargaining: occupational differences; organization of business—*Representatives:* proof of choice; application for membership in union; strike benefit pay-roll—*Employee Status:* following discriminatory discharge—*Collective Bargaining:* refusal to negotiate with representatives; refusal to recognize representatives as bargaining agency representing employees—*Strike—Interference, Restraint or Coercion:* expressed opposition to labor organization; questioning employees regarding organizational activities and union affiliation; by public officials—*Discrimination:* discharge—*Reinstatement Ordered, Non-Strikers—Back Pay:* awarded—*Reinstatement Ordered, Strikers:* strike provoked by employer's law violation; displacement of employees hired during strike; preferential list ordered, including.

Mr. David A. Moscovitz for the Board.

Mr. Leon Girofsky, Mr. T. Girard Wharton and Mr. Joseph Halpern, of Somerville, N. J., for respondents.

Mr. Alexander Feller, of New Brunswick, N. J., for the Union.

Mr. Ralph T. Seward, of counsel to the Board.

DECISION

STATEMENT OF CASE

Upon an amended charge,¹ duly filed by Harry A. Posner, as agent for Local No. 149 of the International Ladies' Garment Workers' Union, hereinafter referred to as Local No. 149, the Regional Director for the Second Region, on January 28, 1936, issued on behalf of the National Labor Relations Board, hereinafter referred to as the Board, a complaint against Benjamin Fainblott² and Margorie Fainblott,³ individuals doing business under the firm names and styles of Somerville Manufacturing Company and Somerset Manufacturing Company, both of Somerville, New Jersey, respondents herein. The complaint alleged that the respondents had engaged in and were engaging

¹ The original charge was filed on October 14, 1935. The only change made in the amended charge was to add the name of Margorie Fainblott as respondent.

² Also known and referred to in the charge as Benjamin Feinblatt and in the complaint as Benjamin Fainblatt.

³ Referred to in the complaint as Margaret Feinblatt or Margorie Fainblatt.

in unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1), (3) and (5) and Section 2, subdivisions (6) and (7) of the National Labor Relations Act, approved July 5, 1935, hereinafter referred to as the Act. In substance, the complaint alleged:

1. The respondents are doing business in Somerville, New Jersey, under the firm names, Somerville Manufacturing Company and Somerset Manufacturing Company, and are engaged in the manufacture, sale and distribution of women's sportswear. In the course of this business they have caused substantial amounts of raw material and finished goods to be purchased, transported and sold in interstate commerce.

2. Between the approximate dates of August 21 and September 18, 1935, the respondents, by their officers and agents, discharged and have since refused to reemploy Elizabeth Schoka,⁴ Angelina Matteis, Lorraine Heitz, Ethel Rice, Mary Gecik, Fay Katz and Anna Santoro⁵ for the reason that they had joined and assisted a labor organization known as Local No. 149 of the International Ladies' Garment Workers' Union, such discharge and refusal constituting unfair labor practices within the meaning of Section 8, subdivisions (1) and (3) of the Act.

3. On or about September 13, 1935, the respondents refused and have since refused to bargain collectively with Local No. 149 through Harry A. Posner, its representative, although at that time the membership of Local No. 149 constituted a majority of the production employees in the respondents' Somerville plant and although the production employees constituted a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act, such refusal constituting unfair labor practices, within the meaning of Section 8, subdivisions (1) and (5) of the Act.

The complaint and the accompanying notice of hearing were duly served on the respondents and on Local No. 149. On February 4, 1936, the respondents filed an answer which admitted that they were engaged in business in Somerville, New Jersey, in the manufacture of women's sportswear, but denied that they were engaged in its "sale and distribution", or that they were engaged in interstate commerce. The answer also denied that the respondents had engaged in unfair labor practices. As to the allegations regarding the proper unit for collective bargaining, the representative capacity of Harry A. Posner, as manager of Local No. 149, the refusal to bargain collectively, and the nature of the alleged acts as constituting unfair labor practices affecting commerce, the answer denied that the respondents had

⁴ Referred to in the complaint as Elizabeth Scheka.

⁵ The original and amended charges did not include the name of Anna Santoro.

knowledge or information sufficient to form a belief. Finally, the answer asserted the unconstitutionality of the Act and its inapplicability to the respondents' business.

On February 15, 1936, in accordance with Article II, Section 35, of National Labor Relations Board Rules and Regulations—Series 1, the Board ordered the proceeding to be transferred to and continued before it.

On February 17, 18 and 19, 1936, a hearing was held in Somerville, New Jersey, before Robert M. Gates, the Trial Examiner duly designated by the Board. The respondents, appearing specially, moved to dismiss the complaint upon the grounds that the Act was unconstitutional and that the Board, having issued the complaint, was disqualified from exercising a judicial function by conducting the hearing. The motion was denied and the respondents then took part in the hearing without waiving their right to renew their objection in due course. Full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to file briefs was afforded to all parties; the respondents, however, called no witnesses and introduced no evidence. During the course of the hearing counsel for the Board moved to amend the complaint to conform the pleadings to the proof. The motion was granted. Counsel for the Board also moved to amend the complaint by adding the name of Theresa Yemma to the list of employees alleged to have been discharged by the respondents. The motion was granted over the respondents' objection. The respondents then moved to have the answer conformed to the amended complaint. The motion was granted. At the close of the case for the Board, the respondents moved to dismiss the complaint on the grounds that the Act is unconstitutional and if constitutional is inapplicable to the respondents' business. The motion was denied. The rulings of the Trial Examiner on all motions are hereby affirmed.

On February 24, 1936, the Board, acting pursuant to Article II, Section 3 (a) of said Rules and Regulations—Series 1, directed the Trial Examiner to prepare and file with it his intermediate report. On April 3, 1936, the Trial Examiner filed his intermediate report finding that the respondents had engaged and were engaging in the unfair labor practices alleged in the complaint and recommending, in substance, that they cease and desist therefrom, offer to reinstate the eight discharged employees listed in the amended complaint with back pay, reinstate all striking employees, and proceed to bargain collectively with Local No. 149. The Trial Examiner further recommended that unless the respondents filed with the Board on or before April 14, 1936, a written notification that they would comply with these recommendations, the Board should issue an order requiring such compliance. No such notification of compliance has been filed

by the respondents nor have they filed exceptions to the intermediate report or any other part of the record.

Upon the entire record as thus made, including the pleadings, the evidence adduced at the hearing, and the Trial Examiner's intermediate report, the Board makes the following:

FINDINGS OF FACT

I. RESPONDENTS' BUSINESS AND ITS RELATION TO INTERSTATE COMMERCE

1. In August, 1934, the respondent Benjamin Fainblott, (hereinafter referred to as Fainblott) established the Somerville Manufacturing Company and the Somerset Manufacturing Company in Somerville, New Jersey. Though separately registered, the companies were in fact identical, the two names having been adopted for reasons immaterial here. The respondent, Margorie Fainblott, Benjamin Fainblott's daughter, is registered as part owner of the Somerset Manufacturing Company, but Fainblott's testimony indicates that her ownership is largely formal and that he is in fact in full control. On or about February 15, 1935, Fainblott discontinued the use of the name Somerville Manufacturing Company.

2. The Lee Sportswear Company, New York, New York, (hereinafter called Lee Sportswear) is a partnership composed of Fainblott's children, Margorie, Leo and Irving. Prior to August, 1934, Fainblott had been employed by Lee Sportswear as general supervisor of its shop in New York. Following an adverse decision in the arbitration of a dispute with the union representing the employees of Lee Sportswear, Fainblott came to Somerville and established his present business. The necessary capital was loaned to him by Lee Sportswear in return for a chattel mortgage on his machinery.

3. Counsel for the respondents stipulated with counsel for the Board that the Somerset Manufacturing Company (and prior to February, 1935, the Somerville Company) at its plant in Somerville, New Jersey, manufactures and converts raw material of Lee Sportswear into finished products for the exclusive account of Lee Sportswear, which sells and distributes these finished products for its own account throughout the United States. The products are for the most part women's sport clothing, such as snow suits, ski pants, slacks, beach wear, shorts, etc.

4. The raw material, title to which remains throughout in Lee Sportswear, is usually cut by that company in New York City and shipped to the Somerset Manufacturing Company. Sometimes the raw material is shipped at the order of Lee Sportswear directly from the mills, many of which are outside the State of New Jersey, to the respondents' plant and is cut there.

5. As soon as possible after the raw material is received, it is made up into finished goods. Sol Fainblott, another of Fainblott's sons, is maintained by Lee Sportswear as its representative at the Somerville plant. After the raw material is manufactured and converted by the respondents, the finished goods are delivered to Sol Fainblott. Some he ships directly to customers of Lee Sportswear throughout the United States; the rest he ships to Lee Sportswear itself in New York City. Such shipments are made on an average of four or five times a week; no goods are stored at the factory.

6. Fainblott operates under a standing agreement with Lee Sportswear, whereby he converts and finishes according to their order whatever raw materials they send him and is paid therefor at rates varying with the type of goods produced. These contractual payments are the business' only income, Fainblott receiving no dividends from Lee Sportswear and having technically no financial interest therein. It appears, however, that Fainblott is the principal or only manufacturer with whom Lee Sportswear contracts. Thus he testified in describing his relationship to Lee Sportswear: "The only unusual thing is whereas they are not supplying other contractors with work, they will supply me with work. That is the relationship between father and children."

7. Though technically an independent enterprise, the Somerset Manufacturing Company thus operates in fact as the principal manufacturing department of Lee Sportswear, a company engaged in selling sporting goods in interstate commerce. The operations of the respondents require and are a part of a continuous flow of goods in such commerce between the respondents and the mills, the respondents and Lee Sportswear, and the respondents and the customers of Lee Sportswear. The volume of this flow varies directly with the volume of the respondents' output.

8. The aforesaid operations of the respondents constitute a continuous flow of trade, traffic and commerce among the several States.

II. THE APPROPRIATE UNIT

9. The employees of the Somerset Manufacturing Company fall naturally into four classes: (1) those in the tailoring department; (2) the cutters; (3) the "general" or maintenance men; and (4) the supervisory staff. The workers in the tailoring department are for the most part either machine operators or "floor girls"; i. e., girls engaged in trimming, cleaning, folding and packing the goods. In addition there is one "finisher" who comes in only occasionally to sew on snaps, hooks and eyes, etc. There are two cutters, who work irregularly on material; Fainblott himself referred to them as constituting a separate department. The activities of the four "general"

men, though not described in detail in the record, seem to consist of such tasks as tending the machines, cleaning the floor, carrying material from one machine to another, etc., though occasionally they have helped to sew on eyelets. The supervisory staff consists of a foreman, forelady, and a bookkeeper.

10. The tailoring department of the Somerset Manufacturing Company, consisting of the operators, floor girls, and finisher, constitutes a unit appropriate for the purposes of collective bargaining.

III. THE DESIGNATION OF LOCAL NO. 149 AS REPRESENTATIVE OF THE EMPLOYEES IN THE TAILORING DEPARTMENT

11. Local No. 149 of the International Ladies' Garment Workers' Union is a labor organization which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of work.

12. Following the invalidation of the National Industrial Recovery Act, Fainblott instituted a series of severe wage cuts. On August 14, 1935, three employees of the tailoring department, Ethel Rice, Anna Santoro, and Mary Morano, at the request of a number of the others, went to the office of Harry A. Posner, manager of Local No. 149, at Plainfield, New Jersey. They asked his assistance in improving wages and working conditions in the respondents' plant. While at his office the three girls filled out application cards for membership in Local No. 149. They returned to the plant and persuaded another employee, Elizabeth Schoka, to fill out a card. Then as Posner had suggested, they called a meeting of interested employees for August 21, 1935. At that meeting, attended by Posner, at least 15 girls of the tailoring department filled out application cards for membership in Local No. 149. Thirteen more applied at a second meeting on August 28 and two others applied shortly thereafter. According to the custom of Local No. 149, these 34 employees became members of Local No. 149 for purposes of collective bargaining upon the signing of their application cards, though none of them had as yet paid union dues. As further evidence of their membership, the Union has contributed regularly to their support during the strike.

13. The eight girls of the tailoring department who are found below to have been discharged for union activities are included in the 34, since they continued to be employees of the Somerset Manufacturing Company within the meaning of Section 2, subdivision (3) of the Act. Application cards were also filled out by one of the "general" men and by at least seven individuals who, for reasons unknown to us, had been discharged or left the employment of the Somerset Manufacturing Company before September 6, 1935. As they were not in the tailoring department, the appropriate unit for collective bargaining, they have been excluded from our calculations.

14. At either the first or second meetings of Local No. 149, Harry A. Posner, as manager of Local No. 149, was chosen by the employees present to represent them in collective bargaining with the respondents. Regardless of when that choice was formally made, it is clear from the subsequent actions of all the 34 members of Local No. 149 that they ratified that choice.

15. During the week ending September 7, 1935, at or about which time it is alleged that the respondents refused to bargain collectively, there were on the payroll of the Somerset Manufacturing Company, 53 employees of the tailoring department. To them must be added the six employees of that department who, we find below, had up to that time been discharged for union activities since August 14, 1935. One of the six, Elizabeth Schoka, was temporarily employed at that time by the Stars Dress Shop in Plainfield, New Jersey, but her employment there lasted only four or five weeks and cannot be considered "regular" or "substantially equivalent" to her position with the Somerset Manufacturing Company, within the meaning of Section 2, subdivision (3) of the Act. The total number of employees in the unit was thus 59. The 34 members of Local No. 149 were therefore in a clear majority. These figures continued unchanged until September 18, the day of the strike.

16. On September 6, 1935, Local No. 149 of the International Ladies' Garment Workers' Union had been designated by a majority of the employees in the tailoring department of the Somerset Manufacturing Company as their representative for the purpose of collective bargaining.

IV. THE REFUSAL TO BARGAIN COLLECTIVELY

17. On or about August 30, 1935, Posner called on Fainblott at the plant, told him that he had been delegated by his employees to present certain demands for the improvement of conditions at the plant, and outlined these demands. Fainblott replied that he would take the proposals into consideration and let him know his answer in a few days. On September 6, Posner called Fainblott on the telephone. According to Posner's testimony, Fainblott told him that he would have no dealings with him, would have nothing to do with a union, and that he did not recognize Posner as legal representative of his employees. Fainblott testified that he did not remember saying he would never recognize a union for collective bargaining but admitted that he said that before he would allow an outsider to run his business he would get out of it. In reply to subsequent questions by counsel for the Board as to his willingness to deal with Local No. 149, Fainblott refused to give a direct answer, merely repeating three times, "I will not let an outsider run my business."

18. Posner reported this rebuff to the members of Local No. 149. They voted unanimously to strike at 10 A. M., September 18. All of the 34 members of Local No. 149 who had not previously been discharged struck either at the time set or within a day or two thereafter. The strike is still in progress, though the record indicates that one or two of the girls have gone back to work.

19. About two weeks after the strike began, Posner went to the office of Mr. Girofsky, Mr. Fainblott's attorney and representative, and attempted to open negotiations for a settlement. Girofsky informed him that "Mr. Fainblott would not talk union or recognize anybody that had any connection with the union." At some subsequent date, Mr. Posner, his attorney, Mr. Feller, Mr. Girofsky, Mr. Fainblott, and Mr. Moscovitz, Regional Attorney for the Second Region, met and discussed terms of settlement. Though the record is not clear, the meeting appears to have been fruitless.

20. On or about September 6, 1935 the respondents refused and have since continued to refuse to bargain collectively with Local No. 149, through Harry A. Posner, as representative of the employees in the tailoring department of the Somerset Manufacturing Company.

21. The strike of certain of the respondents' employees on September 18, 1935, resulted directly from the respondents' refusal to bargain collectively.

V. DISCRIMINATORY DISCHARGES

22. It is alleged that between August 14 and September 18, 1935 the respondents discharged and have since refused to reinstate the following employees because of their union activities:

(a) *Elizabeth Schoka* had been employed as an operator by the Somerset Manufacturing Company since August 1934, save for a brief interval when she had been temporarily laid off because of lack of work. For a while she had been classed as a "learner" but for some months before her discharge she had been classed as a regular operator and accordingly had been paid at piece rates. Since the invalidation of the National Industrial Recovery Act she had averaged from \$9.00 to \$12.00 a week. There is no evidence that she had been inefficient or below standard in any way. On August 14, 1935 she met the three girls returning from their visit to Mr. Posner, and filled out an application card for union membership. Shortly before or after this date, Fainblott called her to his office and asked her, "Who approached you to sign the union—Frank or his wife?"⁶ She replied, "Nobody". A few days later, she was told by the foreman, "You are causing too much trouble. Get your work and go

⁶ The identity of "Frank" is not made clear in the record.

home." She went home at once. Since that time she has worked for four or five weeks for the Stars Dress Shop in Plainfield, New Jersey, at \$17.00 a week.

(b) *Lorraine Heitz*⁷ began working for the Somerset Manufacturing Company as a floor girl in April, 1935 and was employed continuously until the time of her discharge. There is no evidence that she was inefficient in any way. Since the invalidation of the National Industrial Recovery Act she had been paid 21 cents an hour. Two weeks before her discharge this rate was cut without notice to 18 cents an hour. Her hours were irregular, averaging between thirty to thirty-five hours a week. She had taken some leadership in inviting girls to the first meeting of Local No. 149. Shortly before the meeting the foreman had asked her if she was interested in Local No. 149 and for information about it. She had replied she had no information to give him. On the afternoon of August 21 she was quite busy and worked overtime. Before leaving she and Ethel Rice, as was customary, asked Fainblott what time they were to come in next morning. He replied, "I am sorry girls there is no work for you." They asked him why and he replied, "I have no more work for you girls, you will have to go to the union." Both girls testified that at that time there was an exceptionally large amount of work to do. The next morning they returned to get their pay and asked Fainblott again for work. He replied that he had told them once before that he had no work for them and opening the door of the first floor where the floor girls usually worked showed that there was no one there. On their way in, however, they had already seen the other floor girls waving to them from the windows of the third floor. Since her discharge Lorraine Heitz has not obtained employment elsewhere.

(c) *Ethel Rice* began working as a floor girl for the Somerset Manufacturing Company in January, 1935 and was employed continuously until her discharge. There is no evidence that she was in any way inefficient. Since the wage cut following the invalidation of the National Industrial Recovery Act, she had been paid 25 cents an hour. Her hours were irregular, her weekly pay ranging from \$6 to \$10 a week. She was one of the three girls who visited Posner on August 14 and asked his help in forming a union. She was active in trying to interest girls in Local No. 149 and in inviting girls to the first meeting. Her account of the discharge of Lorraine Heitz and herself on the afternoon of August 21, 1935, tallies with that given by Lorraine Heitz in all essentials including the facts of their overtime work, the use by Fainblott of substantially the lan-

⁷ Also known and listed on the payroll as Lorraine Vones.

guage, "I have no more work for you girls—you can go to the Union for work", and the effort of Fainblott to convince them that there was no work by showing them the empty first floor while the other floor girls were upstairs. The record does not reveal whether or not she has worked elsewhere since her discharge.

(d) *Angelina Matteis* began work as an operator for the Somerset Manufacturing Company about a year before her discharge. Save for a few lay-offs of a half a day or so in slack seasons, she was employed continuously the entire year. There is no evidence that she was inefficient in any way. She worked at piece rates averaging from \$8 to \$12 a week. She had been active in inviting the girls to the first meeting of Local No. 149. At that first meeting she joined. A few days later, when she reported for work in the morning, she was told by the foreman, "I am sorry you are causing too much trouble. I have no more work for you." She went home at once. Since that time she has worked for one week at a shop in Plainfield, receiving \$14.

(e) *Mary Gecik* began work as an operator at the Somerset Manufacturing Company in March, 1935, and was employed continuously until her discharge. There is no testimony that she was in any way inefficient. After the wage cut that followed the invalidation of the National Industrial Recovery Act she averaged at piece rates from \$7 to \$8 a week. She joined Local No. 149 at its first meeting, on August 21. A few days thereafter, when she went to work in the morning, she was told by the foreman, "I have not any more work for you. You are causing too much trouble. If you want work go to the union. The Union will give you work." She left at once. She has not been employed since her discharge.

(f) *Fay Katz* began working as an operator with the Somerset Manufacturing Company in December, 1934 and was employed continuously until her discharge. There is no evidence that she was in any way inefficient. She was paid at piece rates. Her hours varied from 14 to 40 hours a week during the last five weeks of her employment. When she worked 40 hours her pay averaged \$7 or \$8 a week. She was active in talking to the girls about Local No. 149 and in inviting girls to its meetings, and joined on August 21. The forelady had spoken to her concerning Local No. 149 at about the time of this first meeting. When she reported to work a few days before the strike, Fainblott refused to allow her into the plant, saying: "I have no work for you." When she said he had given other girls work, he replied: "I don't owe you anything. If you want work you can go to the Union." Since that time she has worked four and one-half days at a shop in Plainfield, receiving a little over \$15.

(g) *Anna Santoro* was employed as an operator by the Somerset Manufacturing Company from the time it opened until her discharge. According to her uncontradicted testimony she was one of the fastest and highest paid of the operators. Since the invalidation of the National Industrial Recovery Act she had been paid at piece rates between \$8 and \$9 a week. She was one of the three girls who visited Mr. Posner at his office in Plainfield, and had attended all the union meetings of Local No. 149. On the morning of the strike, September 18, the forelady, after first speaking to a girl who worked beside her and then to the foreman, came over to her, said to her, "no more work for you." She also told her that she had heard that she was the one that was going to blow the whistle to call the girls out on strike and that she was the one that had started all the trouble by going to Mr. Posner. She left at once, fifteen minutes before the strike was called.

(h) *Theresa Yemma* was employed by the Somerset Manufacturing Company from April, 1935 to the time of her discharge. She worked some of that time as a floor girl and the rest as an operator. There is no evidence that she was in any way inefficient. There is no information in the record as to the rate of her pay after the invalidation of the National Industrial Recovery Act. She joined Local No. 149 on August 21 at its first meeting. During the following week, though she reported regularly for work, she was given nothing to do by the foreman though there was much to do at which she was experienced. Finally, the day after the second meeting of Local No. 149, when she went for her pay, the foreman told her he had no work for her, that she had been causing too much trouble. She left at once. According to her uncontradicted testimony, she had never been disciplined or reprimanded during her previous employment by the company. Since her discharge she has worked from the middle of September to the end of December at another plant at an average pay of \$13 a week. She also worked for the M. H. Fishman Department Store on each Saturday during October, November and December, at 21 cents an hour, usually for 10 hours a day.

23. The respondents insisted at the hearing that these eight girls had not been discharged but had been temporarily laid off because of lack of work. Discrimination through the laying off of employees active in union organization is as clearly within the prohibition of Section 8, subdivision (3), of the Act, as is their discharge. In any event, we cannot accept the respondents' explanation that the girls were laid off. Fainblott himself testified that one of his busy seasons began in August or September. Previous lay-offs due to lack of work had usually lasted not more than a few days and the longest mentioned in the record was from the middle of December to "some-

time after the New Year". Fainblott himself customarily notified girls who had been laid off when to return. He testified that he has taken on new employees to replace both the girls on strike and the eight allegedly discharged, and there is no evidence in the record that he sent any such notification to the eight girls in question. All eight had joined Local No. 149 either at or before its first meeting; several had helped to organize that meeting; two had visited Mr. Posner and asked his aid. The supervisory staff evidently suspected or knew of these activities, as their questions to some of the eight reveal. Upon being discharged, all eight were told either that they were causing trouble or that they should "go to the union for work".

24. The record contains further evidence of Fainblott's deep hostility to Local No. 149 and his determination to thwart any effort to organize his plant. Fainblott testified that before the first meeting of Local No. 149 he learned from certain girls in the plant that an effort to organize the employees was being made. On the afternoon of August 21, the day set for the first meeting, Fainblott invited Mayor Hess of Somerville and a Mr. Hawley, from whom he had rented the plant, to speak to the girls. He insured the full attendance of the machine operators by closing the doors of the second floor where they worked, turning the power off, and telling them to gather around. The Mayor then addressed them, telling them, in substance, to have no connection with Local No. 149, but to stick to the boss where their bread and butter came from, and warning them that their boss would have nothing to do with Local No. 149, and that if they went on strike they would have to go on relief. Mr. Hawley recounted his own experience as a member of a union which had struck unsuccessfully, and advised the girls against joining.

25. On August 28, the afternoon before the second meeting of Local No. 149, Fainblott invited Sheriff Adams of Somerset County to the plant. When the girls came downstairs to get their pay, Fainblott closed the doors and refused to allow anyone to be paid until they were all gathered together. Sheriff Adams then spoke advising the girls against joining Local No. 149 because Fainblott would never sign an agreement with a union.

26. Several employees testified to the substance of these addresses. Fainblott testified that in none of them was a union mentioned but that the speakers merely asked the girls not to make trouble for a peaceful factory. When pressed, however, he admitted that he had heard of Local No. 149 and of a possible strike, and said he "presumed" the speakers came to discuss the threatened strike. As against the testimony of the employees, and in the light of his admitted knowledge of the plans for a union, we find his assertion that the strike and "trouble" were discussed without mention of the union to be unworthy of credence.

27. In the light of the language used in connection with the discharges and of all the attendant circumstances, we find that the respondents, or their agents, by discharging the eight girls named in the amended complaint for the reason that they joined and assisted Local No. 149, discriminated against them in regard to hire and tenure of employment, thereby discouraging membership in a labor organization. We also find that by such discharges, the respondents interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act.

28. It is clear from the record that the discharged girls have not applied individually to the respondents for reinstatement. It is equally clear that their reinstatement was among the terms offered by Posner to the respondents in his effort to settle the strike, and was rejected by them when they refused to bargain collectively. Two weeks before the hearing Fainblott offered through Commissioner of Conciliation Moffet of the United States Department of Labor to reemploy seven workers at once and the balance as he could absorb them, but according to Posner, the terms included the dropping of union affiliations. Fainblott himself said that he would employ workers individually but not "as a body." In view of Fainblott's attitude toward the union and toward collective bargaining, it is evident that he conditioned reinstatement upon the abandonment by the girls of the rights guaranteed in Section 7 of the Act. Such a condition can only be treated as a refusal to reinstate.

VI. THE EFFECT UPON COMMERCE

29. Between September 1 and 17, 1934, approximately 1065 dozen finished garments were shipped from the respondents' plant. From September 18 to 30, 1934, approximately 987 dozen garments were shipped. Though the record is incomplete as to the shipments in October, 1934, it is clear that at least 1011 dozen were shipped. The shipments from September 1 to 17, 1935, totaled approximately 857 dozen. The strike in this case began on September 18, 1935. The shipments from September 18 to 30, 1935, totaled approximately 373 dozen. In October, 1935, the record reveals that there were at least 680 dozen shipped, although there may have been more. Thus while in September, 1935, before the strike, the plant's output was about 80 per cent of the figure for the same period in 1934; after the strike its output dropped to less than 38 per cent of that during the same period in 1934. Though the record is not clear, it seems probable that the former level of production was not regained during October.

30. The aforesaid acts of the respondents have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

31. That the eight discharged girls and those who struck on September 18, 1935 are now without employment (except for one or two who may have returned) is a direct result of the unfair labor practices in which the respondents are found to have engaged. To repair the damage done and return the parties as nearly as possible to the status quo ante these employees must be reinstated and the eight discharged for union activity must receive, in addition, back pay. The record indicates that since September 18, 1935 the discharged or striking employees have been replaced by others. It also indicates that the respondents' activities are seasonal and that the number they can maintain in employment varies. We will order, therefore, that the respondents offer to reinstate the eight discharged employees with back pay and also that they offer to reinstate all striking employees whose positions have been filled by others employed since September 18, 1935. The remaining striking employees must be placed on a preferential list and offered employment according to their seniority in the respondents' employ as work for them becomes available. Without such reinstatement, our order that the respondents bargain collectively with Local No. 149 would be meaningless and futile and the purpose of the Act could not be effectuated.

CONCLUSIONS OF LAW

· Upon the basis of the foregoing findings of fact and upon the entire record in the proceeding the Board finds and concludes as a matter of law:

1. Margorie Fainblott, as registered part owner of the Somerset Manufacturing Company, is properly a respondent in this proceeding, together with the actual owner, Benjamin Fainblott.

2. Local No. 149 of the International Ladies' Garment Workers' Union is a labor organization, within the meaning of Section 2, subdivision (5) of the Act.

3. The tailoring department of the Somerset Manufacturing Company is a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

4. By virtue of Section 9 (a) of the Act, Local No. 149 of the International Ladies' Garment Workers' Union, having been designated on or before September 6, 1935 by a majority of the employees of the tailoring department of the Somerset Manufacturing Company as their representative for the purposes of collective bargaining, has been at all times since said date the exclusive representative of all said employees for the purposes of collective bargaining.

5. By refusing and continuing to refuse to bargain collectively with Local No. 149 of the International Ladies' Garment Workers' Union as the exclusive representative of the employees in the tailoring department of their plant, the respondents have engaged in and are engaging in unfair labor practices, within the meaning of Section 8, subdivision (5) of the Act.

6. By discriminating in regard to hire and tenure of employment against Elizabeth Schoka, Lorraine Heitz, Ethel Rice, Angelina Matteis, Mary Gecik, Fay Katz, Anna Santoro and Theresa Yemma, thereby discouraging membership in Local No. 149 of the International Ladies' Garment Workers' Union, the respondents have engaged in and are engaging in unfair labor practices, within the meaning of Section 8, subdivision (3) of the Act.

7. By refusing and continuing to refuse to bargain collectively with Local No. 149 as aforesaid and by discriminating in regard to hire and tenure of employment as aforesaid, thereby interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondents have engaged in and are engaging in unfair labor practices, within the meaning of Section 8, subdivision (1) of the Act.

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

ORDER

On the basis of the foregoing findings of fact and conclusions of law and pursuant to Section 10, subdivision (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondents, Benjamin Fainblott and Margorie Fainblott, individuals doing business under the firm names and styles of Somerville Manufacturing Company and Somerset Manufacturing Company, shall:

1. Cease and desist from:

(a) In any manner interfering with, restraining, or coercing their employees in the exercise of their right to join and assist Local No. 149 of the International Ladies' Garment Workers' Union or any other labor organization;

(b) Discouraging membership in Local No. 149 of the International Ladies' Garment Workers' Union or in any other labor organization of their employees by discharging, refusing to reinstate, or otherwise discriminating in regard to tenure or terms of employment against employees who have joined or assisted Local No. 149 or any other labor organization of their employees;

(c) Refusing to bargain collectively with Local No. 149 of the International Ladies' Garment Workers' Union as the exclusive representative of the employees in the tailoring department of the Somerset Manufacturing Company.

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

(a) Upon request, bargain collectively with Local No. 149 of the International Ladies' Garment Workers' Union as the exclusive representative of its employees in the tailoring department in respect to rates of pay, wages, hours of employment and other conditions of employment.

(b) Offer to Elizabeth Schoka, Lorraine Heitz, Ethel Rice, Angelina Matteis, Mary Gecik, Fay Katz, Anna Santoro and Theresa Yemma immediate and full reinstatement to their former positions without prejudice to any rights and privileges previously enjoyed.

(c) Offer employment to all employees of the tailoring department who went on strike on September 18, 1935 or within one week thereafter where positions held by such employees on September 18, 1935 are now held by persons who were not employees of the respondents on September 18, 1935 but were employed subsequently thereto, and place all other employees who struck on September 18, 1935 or within the following week on a preferential list to be offered employment according to their seniority in respondent's employment, as and when their labor is needed.

(d) Make whole said Elizabeth Schoka, Lorraine Heitz, Ethel Rice, Angelina Matteis, Mary Gecik, Fay Katz, Anna Santoro and Theresa Yemma for any loss of pay they have suffered by reason of their discharge by payment to each of them, respectively, of a sum of money equal to that which she would normally have earned as wages during the period from the date of her discharge to the date of such offer of reinstatement, less earnings from other employment during such period.

(e) Post notices in conspicuous places in the plant stating (1) that the respondents will cease and desist in the manner aforesaid, and (2) that such notices will remain posted for a period of thirty (30) consecutive days.