

In the Matter of FOSTER BROTHERS MANUFACTURING COMPANY INC.
and FEDERAL LABOR UNION, LOCAL NO. 20137

Case No. C-68.—Decided June 3, 1936

Bed, Bedding and Related Products Industry—Interference, Restraint or Coercion: expressed opposition to labor organization, threats of retaliatory action; espionage; bribing union members; questioning employees regarding organizational activities and union affiliation—*Discrimination:* discharge—*Strike—Employee Status:* during strike—*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. Laurence A. Knapp and *Mr. Jacob Blum* for the Board.

Weinberg & Sweeten, by *Mr. Leonard Weinberg* and *Mr. Harry J. Green*, of Baltimore, Md., for respondent.

Mr. Joseph Rosenfarb, of counsel to the Board.

DECISION

STATEMENT OF CASE

On January 20, 1936, Federal Labor Union, Local No. 20137, affiliated with the American Federation of Labor, hereinafter called the union, filed with the Regional Director for the Fifth Region a charge that the Foster Brothers Manufacturing Company, Inc., Baltimore, Maryland, hereinafter called the respondent, had engaged and was engaging in unfair labor practices affecting commerce, within the meaning of the National Labor Relations Act, approved July 5, 1935, hereinafter called the Act. On January 21, 1936, the Board issued a complaint signed by the Regional Director for the Fifth Region alleging that the respondent had committed unfair labor practices, within the meaning of Section 8, subdivisions (1) and (3), and Section 2, subdivisions (6) and (7) of the Act. The complaint alleges in substance:

1. The respondent while engaged in commerce among the states terminated the employment of and refuses to reinstate William Zoeller, Herbert Deaton, Henry Deimel, W. R. Berg, Vernon Berg, Clifford Dietrich, Elmer Grove, George Grove, Cornelius Bees, August Kelch and William Baranowski for the reason that they joined and assisted a labor organization known as Federal Labor Union, Local No. 20137, and engaged in concerted activities with other employees

for the purpose of collective bargaining and other mutual aid and protection.

2. By terminating the employment of and refusing to reinstate the above mentioned employees, the respondent has committed unfair labor practices affecting commerce, within the meaning of Section 8, subdivisions (1) and (3), and Section 2, subdivisions (6) and (7) of the Act.

The complaint and accompanying notice of hearing were duly served upon the parties in accordance with Article V of National Labor Relations Board Rules and Regulations—Series 1. Thereafter the respondent filed a special appearance objecting to the jurisdiction of the Board on constitutional grounds. Henry G. Perring, the Trial Examiner designated by the Board, overruled and denied these objections. Without waiving its rights under the special appearance, the respondent filed an answer to the complaint denying the allegations concerning the unfair labor practices and moving that the complaint be dismissed.

Pursuant to the notice, a hearing was held on February 6, 1936, at Baltimore, Maryland. The respondent, appearing by counsel, participated in the hearing. Full opportunity to be heard, to cross-examine witnesses and to produce evidence bearing upon the issues was afforded to all parties. Counsel for the respondent, however, waived the right to cross-examine and to introduce evidence. The evidence introduced in behalf of the Board is therefore uncontradicted. The Trial Examiner denied the respondent's motion to dismiss, which denial is hereby affirmed.

Thereafter the Trial Examiner filed an Intermediate Report with the Regional Director in accordance with Article II, Section 30 of National Labor Relations Board Rules and Regulations—Series 1. The report was duly served upon the parties. The Trial Examiner found that the respondent had committed unfair labor practices, within the meaning of Section 8, subdivisions (1) and (3) of the Act, and recommended that the respondent desist from interfering with and coercing its employees in the rights guaranteed by the Act, and reinstate the discharged employees to their former positions, with back pay. The motion of the respondent to dismiss the complaint renewed during the hearing and its various objections to the introduction of evidence, which were based generally upon grounds of alleged irrelevance, immateriality and hearsay were overruled by the Trial Examiner. These rulings are hereby affirmed. No exceptions to the Intermediate Report were filed by either party.

Upon the entire record of the case, including the pleadings, the stenographic report of the hearing, and documentary and other evidence offered and received at the hearing, the Board makes the following:

FINDINGS OF FACT

I. THE RESPONDENT AND ITS BUSINESS

The respondent is and has been since August 23, 1927, a corporation organized and existing under the laws of the State of Maryland, having its principal office and place of business in the City of Baltimore, State of Maryland, and has continuously been engaged in the production, sale and distribution of bed springs, day beds, studio couches, cots, bunks, inner springs for mattresses and beds, and related products and equipment.

Eighty per cent of the raw materials used by the respondent in the manufacture of its products is shipped to its plant in Baltimore from states other than Maryland. The various materials used by the respondent and their places of origin are:

Wire from Cleveland, Ohio.

Angle Iron from Pennsylvania.

Castings from West Virginia.

Rivets from New Brighton, Penna.

Screws from New York.

Cotton from Baltimore, Maryland.

Lumber, $\frac{1}{3}$ from Maryland; $\frac{2}{3}$ from Virginia.

Ticking, 75% from New York; 12½% from Georgia; 12% from Louisiana.

Paint and Enamels from Baltimore, Maryland.

Tubing from Ohio.

Most of the equipment, machinery and supplies used by the respondent come from Maryland.

Fifty-one and four-tenths per cent of the finished products of the respondent is shipped to destinations outside of the State of Maryland. The respondent maintains warehouse space in Richmond, Virginia and High Point, North Carolina, to which points a portion of the respondent's finished products is directed. The warehouses are used for storing and distribution, and not as sales points. In case of shipments from these warehouses, orders are accepted in Baltimore. Fifty per cent of the shipments from the plant of the respondent at Baltimore are made by truck, 40% by railroad, and 10% by boat. The respondent itself owns no trucking or other transportation companies.

The respondent employs six traveling salesmen, who solicit orders in Maryland, West Virginia, Virginia, North Carolina, and South Carolina. Ninety per cent of the respondent's products is sold to purchasers who are retailers only. The remainder is sold to mail order houses.

The average number of employees of the respondent during the last five years were :

1931.....	60		1934.....	95
1932.....	60		1935.....	125
1933.....	75			

The peak, average and minimum weekly payrolls for the same years were approximately as follows: .

1931.....	\$1,360	\$1,150	\$770
1932.....	1,290	1,050	965
1933.....	1,660	1,200	910
1934.....	2,160	1,530	1,070
1935.....	2,630	2,150	1,555

The total volume of sales in dollars for the same years were:

1931.....	\$225,000		1934.....	315,000
1932.....	200,000		1935.....	390,000
1933.....	265,000			

By 1935 the dollar sales of the respondent had thus increased 95% over 1932, and the average number of employees had increased 108%. The average payroll per week had increased 104.77% in 1935 over 1932. The growth and improvement shown by the business of the respondent in 1935 over 1932 were not however accompanied by a corresponding increase in the wages of employees of the respondent. On the contrary, from 1932 to 1935, the average wage had actually decreased \$.30 per week or 1.7%.

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

II. THE ORGANIZATION OF THE UNION AND THE HOSTILITY OF THE RESPONDENT

On December 2, 1935 the foreman of the respondent announced an impending 10% cut in wages. This caused general resentment and dissatisfaction on the part of the employees, who were then working full time and even overtime. The matter was discussed among the employees and they decided to hold a meeting. George Grove, one of the employees named in the complaint, distributed cards throughout the plant announcing the time and place of the proposed meeting. On the evening of December 4, 1935 the meeting was held in a public hall. About 70 employees attended. Many of the employees could not attend because they were working late that evening. It was decided unanimously by those attending the meeting to form a union and to affiliate with the American Federation of Labor. Organizers of the American Federation of Labor who had been called in to advise the employees and who were present at the meeting, dissuaded them from their original intention of going out on strike.

To the spontaneous attempt on the part of the employees to organize for their self-protection, the respondent showed an immediate and drastic hostility. By discharging the men who were looked upon as the "ring leaders," by espionage and intimidation, the respondent sought to dragoon its employees into submission and abandonment of their efforts to organize a union. On December 5th William Baranowski, Elmer Grove and George Grove, three of the employees named in the complaint, were called into the office of the respondent at the same time and were questioned by Mr. Hall and Mr. Heller, the president and the secretary-treasurer respectively of the respondent, about the meeting of December 4th. They were told that the respondent did not want the employees to attend any more union meetings and that they would be discharged if they did. When told that the meeting was called because of the 10% cut in wages, the officials of the respondent stated that they had decided not to decrease wages but to increase the hours of work of the time workers five hours a week.

On the morning of December 7th Baranowski was again called to the office and was asked by Mr. Hall and Mr. Heller whether August W. Kelch, Cornelius Bees, George Grove and Elmer Grove were the leaders and instigators of the union. Baranowski gave an evasive reply. Later the same day Baranowski was again plied with the same questions by these officials of the respondent. Apparently expecting a strike on the part of the employees, the officers of the respondent told Baranowski that he would not be laid off or fired, but that in case the employees did go out on strike, he should go out with them; and for doing so, he would be paid \$5.00 a day, which was in excess of his normal wages. The record does not make clear exactly what Baranowski was to do; however, it is a fair inference that he would have been asked to spy on his fellows. Later in the day the same offer was repeated to Baranowski over the telephone by Turner, one of the officials of the respondent.

On the morning of December 7th, August W. Kelch was called to the office and was accused by Heller in the presence of Hall, Turner and McCubbins, the superintendent, of being the instigator of the dissatisfaction in the plant, and the ringleader in the attempt to organize. When he denied the charge they pressed him to disclose the identity of the leaders, which he refused. After this interview McCubbins and Turner expressed their regret to Kelch about what happened. About 11:30 Kelch was paid off and discharged by his foreman, Mossberg, who told him that he was merely carrying out orders. A week before, Turner had told Kelch that he wanted him to take charge of the night force beginning January 1, 1936.

Immediately after Kelch's interview with the management, Cornelius Bees was called to the office and questioned about the meeting, whether another meeting was to be held and whether he was going to attend. When he refused to talk about these matters, Heller told him, "Well, you are through," and ordered the paymaster to get his pay ready. Bees' foreman, Mossberg, paid him off.

On the same day George Grove was discharged by his foreman, Mossberg, who said to him, "I am sorry; I have got to lay you off, George." Grove was the senior inspector in his department and had worked for the respondent continuously for five years. He had acted as foreman in the department on two occasions when Mossberg was sick or absent. Elmer Grove was discharged on the same day. He had been working for the respondent for six years and had never been laid off or criticized. He worked in the assembling department.

During this time some departments were working overtime.

These discharges were brought to the attention of Bennet F. Schauffler, Regional Director for the Fifth Region, National Labor Relations Board. Through his intervention Kelch, Bees, George Grove and Elmer Grove were reinstated by the respondent on December 12th with back pay for lost time.

The next meeting of the employees was held on December 11th, when the charter of Federal Labor Union, Local No. 20137, a labor organization, was presented by Miss Anna Neary, organizer for the American Federation of Labor. There were about 70 employees in attendance; those who had not become members of the union at the meeting of December 4th, joined at this meeting.

At a meeting of the union on December 17th the following officers were elected: Herbert Deaton, vice-president; August W. Kelch, recording secretary; Cornelius Bees, secretary-treasurer; and William Zoeller, sergeant-at-arms. One Kramer, representing the American Federation of Labor, was acting as the president of the union. Another meeting of the union was held on December 27, 1935.

III. THE UNFAIR LABOR PRACTICES

A. The discharges

William Zoeller was elected sergeant-at-arms of the union on December 17th. He had worked for the respondent for 17 years, and was fourth in seniority of the 14 employed in the iron department. On December 30, at the end of the day, John Stack, his foreman, discharged him saying, "Bill, I hate to do this, it is none of my doings, but I have got orders to give you your money." On January 3, 1936 Zoeller saw Hall and was told that they were taking

inventory and business was slack. He later saw McCubbins who said that his hands were tied, that he couldn't discuss the matter, and that it was up to the foreman. The foreman however told him when he went back to him, "As far as I am concerned, you could go back right away," and added, "Well, it looks like they are passing the buck to me, Bill."

Zoeller had never been laid off before because inventory was being taken, or because of slackness of business. As a matter of fact, the respondent was not taking inventory at the time Zoeller was discharged, and his department as well as some of the others were working full time. After his discharge, his work was done by two men who were his juniors in point of service.

Herbert Deaton had been elected vice-president of the union on December 17. He operated various machines in the iron department. When he returned from a vacation on December 31, his foreman told him to see McCubbins. McCubbins said that they were taking inventory and it would be necessary to lay him off for awhile. Prior to his vacation he and the other men in his department had been working overtime. About a week after the purported lay-off, Deaton returned to the plant and was told by his foreman that they had not yet finished taking inventory. They appeared to be as busy as usual in the department.

Vernon Berg was elected to the executive board of the union on January 3, 1936. He was discharged on January 4. He had been employed by the respondent for about two years. His work consisted of putting S-hooks on bed springs in the assembling department. About 11:40 of the morning of January 4 he was paid off by his foreman and was told that the warehouse was filled up and he would have to be laid off for awhile. Prior to his discharge he was working full time and even overtime occasionally.

Roy Berg, a brother of Vernon Berg, was also discharged on January 4, 1936. He was an inspector and did shape-up work in the assembling department. His foreman told him that he would have to be laid off because the warehouse was filled up and it was necessary to cut down expenses. He and his brother made a few attempts to get their jobs back but without success. At the time of his discharge he was working regularly and overtime. He too had been elected a member of the executive board of the union on January 3, 1936.

Clifford Dietrich was discharged on January 9, 1936. He had worked a total of seven years for the respondent. At the end of the day of his discharge his foreman told him that he would have to be laid off awhile. When he inquired why, the foreman "put his face in his hand * * * and kind of smiled, and said, 'Well, all the warehouse is filled, and we are pretty slack.'" At the time of his dis-

charge the assembling department where he was employed was working overtime. Although the respondent later agreed to reinstate him, this was never done. He had been elected a member of the executive board of the union on January 3rd and to the shop committee on January 7th.

Kelch, Elmer Grove, George Grove, Baranowski and Bees were discharged on January 15, 1936. About 4:30 that day they were called into Turner's office and told that they were discharged or laid off. No reason was given. Kelch was recording secretary of the union, Bees was secretary-treasurer, and Elmer Grove was a member of the executive board. George Grove and Baranowski, although not officers of the union, attended the meetings of the union and were active in its affairs.

B. The negotiations between the union and the respondent

On January 3, 1936 a meeting of the union was held at which an executive board was elected consisting of Elmer Grove, Clifford Dietrich, Roy Berg, Vernon Berg, Herbert Florey, William Zoeller and Floyd Albee. On January 7th a meeting of the executive board of the union was held at which a shop committee was appointed to negotiate with the respondent concerning the discharges. Elmer Grove, Clifford Dietrich and August W. Kelch were elected to the committee.

On January 10, 1936 the shop committee conferred with the management concerning the discharges which had taken place before that date. The members of the committee stated that they were representing the union, which had a membership of a large majority of the employees of the respondent and asked the management to recognize the union. Heller at first pretended not to know anything about the union and then made an oblique reply, adding, "This will never be a union shop. . . I am going to hire whom I please." The committee then informed the management that the men were willing to share the work equally rather than to have anyone discharged. Heller replied that he would leave that decision to the superintendent and the foremen.

On January 11th the shop committee, then consisting of Elmer Grove, Kelch, and Bees, was notified by the superintendent that the management's policy was that the plant would continue to be a non-union shop, that they would hire and fire whom they pleased and that the lay-offs would continue. This was also announced by the foremen throughout the shop.

On January 13, 1936 a union meeting was held at which it was decided that further efforts be made to negotiate with the management.

After repeated unsuccessful efforts a conference was finally effected between Heller and two representatives of the American Federation of Labor on the afternoon of January 15th. Heller was impervious to any pleas to reinstate the dismissed men and to the offer to share the work. He would not even discuss the matter nor did he make any counter proposal. When asked to call in the shop committee which he was told consisted of Kelch, Grove and Bees, he left the office for a while and then came back and said that no committee would be called in and that there was nothing to discuss.

On leaving the office of the respondent, at the end of the afternoon, the representatives of the American Federation of Labor were informed by Grove, Kelch and Bees, the members of the shop committee, that they had just been discharged.

C. Conclusions respecting the unfair labor practices

The unconcealed hostility of the respondent to the union was manifested immediately upon its formation when the men who were looked upon as the "ring leaders" were discharged. Thereafter in several instances as soon as an employee was made an officer of the union, dismissal followed. Committee members were discharged immediately after they had conferred with the management. The effect followed the cause with too unerring promptness. No other conclusion is warranted than that the men were discharged because of their union activities.

The reasons assigned by the management for the discharges, namely slackness of work and the taking of inventory have an especially hollow sound in view of the fact that during the time of the discharges the plant of the respondent was on a full time basis with overtime common in several of its departments. This case presents all the elements of an especially ruthless use of the weapon of economic compulsion to interfere with and coerce employees in their exercise of the right to organize and bargain collectively.

The Board concludes that by discharging from employment and thereafter refusing to reinstate August W. Kelch, Elmer Grove, George Grove, Vernon Berg, Roy Berg, Clifford Dietrich, William Zoeller, Cornelius Bees, Herbert Deaton and William Baranowski, and by each of said discharges, the respondent discriminated in regard to hire and tenure of employment and thereby discouraged membership in the labor organization known as the Federal Labor Union, Local No. 20137, and that by such acts the respondent interfered with, restrained, and coerced its employees in the exercise of the right 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.

No evidence substantiating the complaint as to Henry Deimel having been presented, the complaint as to him will be dismissed.

IV. EFFECT OF UNFAIR LABOR PRACTICES ON INTERSTATE COMMERCE

On the morning of January 16, 1936 a meeting of the employees was held concerning the discharge of the shop committee. Another committee was selected to confer with Heller. The same day the committee reported back to the assembled employees that Heller refused to see them. A strike of the employees in protest against the discharges was then called and about 88 employees went out on strike. At the time of the hearing in this case the strike was still in progress.

We find that the aforesaid acts of the respondent have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

In order to make whole the damage caused by the respondent to the employees who were discriminatorily discharged it is imperative that these employees be reinstated to employment with back pay from the time of their respective discharges to the date of offer of such reinstatement.

This action alone however would fall short of effectuating the policies of the Act. In order to protect the rights of the employees of the respondent to organize and bargain collectively we must restore as far as possible the situation as it existed prior to the commission of the unfair labor practices. To do this the striking employees must be reinstated to employment even if their positions are now filled by persons who were not working for the respondent before the strike. The strike in this case, it should be remembered, was called in protest against discharges which were made by the respondent in violation of the Act. Since an "employee" under Section 2, subdivision (3) of the Act includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice" the strikers are still employees of the respondent. As such they are entitled to their jobs, especially since the unfair labor practices perpetrated by the respondent provoked the strike and caused injury not only to those discriminatorily discharged but to the rest of the respondent's employees. An employer who discriminates in regard to hire or tenure of employment or conditions of employment to encourage or discourage membership in any labor organization and thereby interferes, restrains, or coerces employees in the exercise of the rights guaranteed

in Section 7 of the Act, perpetrates a redressable wrong not only against those discharged but also against the rest of the employees who have chosen or might later choose to exercise their rights to self-organization and collective bargaining guaranteed by the Act. The fact that employees choose to protect these rights by their legally recognized right to strike does not in any way destroy their right to proceed under the Act.

We therefore conclude that in order to redress fully the wrongs flowing from the unfair labor practices of the respondent and to protect the rights of the employees, the striking workers should be reinstated to employment.

CONCLUSIONS OF LAW

Upon the foregoing findings of fact the following conclusions of law are made:

(1) Federal Labor Union, Local No. 20137 (the union) is a labor organization, with the meaning of Section 2, subdivision (5) of the Act.

(2) The respondent, by discriminating in regard to the hire and tenure of employment of William Baranowski, Cornelius Bees, Roy Berg, Vernon Berg, Elmer Grove, George Grove, Herbert Deaton, William Zoeller and August W. Kelch, and each of them, has engaged and is engaging in unfair labor practices, within the meaning of Section 8, subdivision (3) of the Act.

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

(4) 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

Upon the basis of the 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 the respondent, the Foster Brothers Manufacturing Company, Inc., to:

1. Cease and desist:

(a) from discouraging membership in any labor organization by discrimination in regard to tenure of employment or any term or condition of employment;

(b) from in any other manner interfering with, restraining, or coercing its employees in the exercise of the right of self-organization, to bargain collectively through representatives of their own

choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection;

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

(a) Offer to William Baranowski, Cornelius Bees, Roy Berg, Vernon Berg, Herbert Deaton, Clifford Dietrich, Elmer Grove, George Grove, August W. Kelch and William Zoeller, and to each and every one of them, immediate and full reinstatement to their former positions, with all rights and privileges previously enjoyed;

(b) Make whole the said William Baranowski, Cornelius Bees, Roy Berg, Vernon Berg, Herbert Deaton, Clifford Dietrich, Elmer Grove, George Grove, August W. Kelch and William Zoeller for any losses of pay they have suffered by reason of their discharge by payment to each of them, respectively, of a sum equal to that which each would normally have earned as wages during the period from the date of his discharge to the date of offer of employment as ordered hereunder, less the amount earned by each of them, respectively, during such period.

(c) Offer employment to employees who were employed by the respondent on January 15, 1936, who struck on January 16, 1936, and who have not since received regular and substantially equivalent employment elsewhere, where the positions held by such employees on January 15, 1936, are now filled by persons who were not working for the respondent on January 15, 1936, and place all other employees who were employed by the respondent on January 15, 1936, who struck on January 16, 1936, and who have not since received regular and substantially equivalent employment elsewhere, on a list to be offered employment if and when their labor is needed.

And it is further ordered that the complaint be, and is hereby dismissed, without prejudice, with respect to Henry Deimel.