

In the Matter of BENJAMIN FAINBLATT and MARJORIE FAINBLATT, 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

Parties: question as to parties to be joined as respondents; changes in nominal ownership of plant; real as well as nominal owner made party to action—*Interference, Restraint or Coercion:* reports on union members and activities—*Representatives:* designation of representatives need not be by election—*Collective Bargaining:* lapse of time since original order; lack of evidence as to present situation; withdrawal of order to bargain collectively.

Mr. David A. Moscovitz, for the Board.

Mr. Leon Gerofsky, Mr. Joseph Halpern, and Mr. T. Girard Wharton, of Somerville, New Jersey, for the respondents.

Mr. Abraham L. Kaminstein, of counsel to the Board.

SUPPLEMENTAL DECISION

AND

ORDER

December 17, 1937

On June 3, 1936, after a hearing, the National Labor Relations Board, herein called the Board, issued a Decision in this case¹ in which it found that Benjamin Fainblatt and Marjorie Fainblatt,² individuals doing business under the firm names and styles of Somerville Manufacturing Company³ and Somerset Manufacturing Company, both of Somerville, New Jersey, herein called the respondents, had engaged in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (3), and (5), and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449. The unfair labor practices so found consisted in discrimination against eight of the respondents' employees in regard to hire and tenure of employment, thereby discouraging membership in International Ladies' Garment

¹ 11 N. L. R. B. 864.

² The name of the respondents has been variously spelled as Feinblatt, Fainblott, and Fainblatt. Marjorie has sometimes been referred to as Margaret, or Margorie.

³ The name, Somerville Manufacturing Company, was discontinued on February 15, 1935.

Workers' Union, Local No. 149, herein called Local No. 149, and in the refusal to bargain collectively with Local No. 149. The Board ordered the respondents to cease and desist from such actions; to reinstate to their former positions, with back pay, the employees found to have been discriminated against; to offer employment to all employees of the tailoring department who had gone out on strike as a result of the unfair labor practices, where the positions held by such employees on September 18, 1935, the date of the strike, were held by persons subsequently employed; to place other striking employees on a preferential seniority list, to be offered employment when their labor was needed; and, upon request, to bargain collectively with Local No. 149.

Pursuant to Section 10 (e) of the Act, the Board, on June 17, 1937, petitioned the United States Circuit Court of Appeals for the Third Circuit, herein called the Court, for the enforcement of this order. On October 4, 1937, the respondents filed a petition with the Court alleging in substance that they had failed to call witnesses and introduce any evidence at the former hearing because they believed that the National Labor Relations Act was unconstitutional, or if constitutional, not applicable to the respondents; that the sole employer of the persons named in the complaint was Marjorie Fainblatt, so that the respondent Benjamin Fainblatt was not a proper or necessary party; that on January 2, 1937, Marjorie Fainblatt sold and conveyed the Somerset Manufacturing Company to Benjamin Fainblatt; that the number of employees had increased from 58 at the time of the Board's hearing, to 200; that no election had ever been held at the plant for the purpose of having the employees select their representatives; that attempts to settle differences between the respondents and Local No. 149 had proven futile; and that since the date of the strike a number of the employees had returned to work. The petition asked leave to adduce additional evidence in support of the allegations set forth therein. On October 15, 1937, the Court ordered that the respondents have leave to adduce additional evidence; and that such additional evidence be taken before the Board, its member, agent or agency, together with any findings thereon, and be made a part of the transcript of the record in this cause.

Pursuant to notice, duly served upon the parties, a hearing was held in New York City on October 22, 1937, before Robert M. Gates, the Trial Examiner duly designated by the Board. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded to the parties. At the outset of the hearing, the Board's attorney objected to the reopening of the proceeding, and to the granting of the petition for leave to adduce additional evidence. The Board called no witnesses at this hearing, and merely cross-examined witnesses for the respondents.

The rulings of the Trial Examiner on motions and on objections to the introduction of evidence are hereby affirmed. The objection of the respondents to questioning on the subject of the details of the transfer of Somerset Manufacturing Company in January, 1937, is hereby denied. In view of the order to be made, we do not need to consider other objections upon which no rulings were made.

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

FINDINGS OF FACT

At the conclusion of the second hearing, the respondents moved to dismiss the complaint on three specific grounds: namely, that there was no testimony that Harry A. Posner represented the employees, or that an election was ever held in which he had been selected; that the respondents were not engaged in interstate commerce; and that the charges ought to be dismissed against Benjamin Fainblatt because, at the time the unfair labor practices are alleged to have occurred, he was nothing more than an employee of Somerset Manufacturing Company, herein called Somerset. The question of interstate commerce has been discussed in the first opinion, and the testimony at the second hearing adds little to that already in the record. We shall review the other objections and then consider the additional evidence bearing upon the discriminatory discharges and other acts of interference with self-organization.

In the petition for leave to adduce additional evidence, the respondents insisted that Benjamin Fainblatt was not a proper or necessary party. The testimony of Benjamin Fainblatt at the first hearing in regard to the ownership of Somerset was as follows:

Q. In what capacity are you associated with these two companies?

A. I am the owner.

Q. Complete owner?

A. Complete owner.

Q. Are you in charge of operations?

A. I am in charge of my own factory * * *

* * * * *

Q. Who is Marjorie Fainblatt?

A. My daughter.

Q. Does she have any ownership interest?

A. No.

Q. She is employed by you?

A. Well, she is and she is not.

Q. In what way is she not?

A. Just merely she is helping me as a daughter a father.

Q. Then is not——

A. Not as an employee.

* * * * *

Q. Marjorie Fainblatt is registered here in Somerville under a trade name also?

A. She has registered under the name of Somerset Manufacturing Company.

Q. She is registered here under that name?

A. Yes.

Q. And operates with the Lee Sportswear Company as a partner; is that it?

A. She is a partner in that firm there.

Q. So that although she is a partner of Lee Sportswear, she is here in your plant working with you?

A. No, sir; she is not in my plant, she only comes in.

Q. But she is a registered owner with your company?

A. She is a registered owner but I am working myself there.

Q. You registered—you testified before that you were the complete owner.

A. Yes.

Q. How is she registered here as a part owner?

A. In place, not to conflict with the what you call them—the code authorities—so as not to have any trouble—so we went to work and I made Somerset and I gave her the permission to——

Q. Then her registration in fact means nothing?

A. No; positively nothing.

At the second hearing, Marjorie Fainblatt testified:

Q. Were you the sole owner of that business? Known as the Somerset Manufacturing Company?

A. I was.

* * * * *

Q. Did Benjamin Fainblatt have any association with the Somerset Manufacturing Company?

A. Only as my manager.

Q. He was not the owner of the Somerset?

A. He was not.

* * * * *

Q. Are you the owner of the Somerset Manufacturing Company today?

A. No, I am not.

Q. Have you disposed of your interest in the Somerset?

A. I have.

Q. And when did that take place?

A. At the beginning of the year.

Q. Do you remember the month?

A. January.

Q. Who became the owner?

A. Benjamin Fainblatt.

Marjorie testified further that she had sold Somerset to her father on January 1, 1937, in return for his assumption of the liabilities of that company. These liabilities included a chattel mortgage on the machinery. This mortgage is held by Lee Sportswear Company, a partnership composed of Fainblatt's children, Marjorie, Lee and Irving. She also testified that as yet her father had made no payments on any of the liabilities, and that she still had a power of attorney, "just in case anything happens to Benjamin".

Upon all the testimony, we find that Benjamin Fainblatt has been, and is now, the real owner of Somerset, and that Marjorie was merely a nominal registered owner. Because of the alleged change in nominal ownership, the Board will amend its order by making it applicable to Benjamin Fainblatt and Marjorie Fainblatt, individuals doing business under the firm name and style of Somerset Manufacturing Company, and to their successors and assigns.

The respondents consistently advanced the claim that Local No. 149 had never been designated by the employees, inasmuch as no election to select a bargaining representative had ever been held by the employees. Under Section 9 (a) of the Act, employees need not hold an election to determine their representatives for purposes of collective bargaining. The only requirement is that such representatives be designated or selected by a majority of the employees in an appropriate unit. On the basis of the evidence submitted at the first hearing, the Board found that Local No. 149 had been so designated. No evidence submitted at the second hearing can be said to contradict this. Nor was any evidence introduced to contravert the Board's previous finding that the respondents on and after September 6, 1935, refused to bargain collectively with Local No. 149 as such representative of its employees.

The Board therefore reiterates what it said in regard to the violation of Section 8 (5) of the Act. That violation is not affected by any subsequent change in the situation. However, testimony that the number of permanent employees in the plant has risen from 59 to approximately 200 is uncontradicted. Two years have now elapsed since the respondents' first refusal to bargain collectively, which precipitated the strike. The Board has no evidence before it as to the present membership in Local No. 149 among the greatly increased force now employed. In view of these circumstances, the Board will amend its order by striking out that part which requires the

respondents to bargain collectively with Local No. 149. This does not mean, of course, that the respondents are relieved of their obligations under Section 8 (5) of the Act, or that if the Union now or subsequently is designated by a majority of the employees in an appropriate unit, the respondents may refuse to bargain collectively with it.

With respect to the discriminatory discharges and the various acts of interference found by the Board in its first decision, neither the petition for leave to adduce evidence, nor the motion to dismiss, challenges the findings of the Board as to these matters. In fact the evidence brought forward by the respondents at the second hearing fully corroborates the conclusions previously reached by the Board. Thus the new testimony discloses that the discharges did not take place because of poor work; that work was not slack at that time; that new workers have replaced the old employees and that the respondents have made no attempt to recall the discharged employees.

The other measures taken by the respondents to thwart the organization of their employees, and the methods of coercion they employed, are now revealed by the respondents' own witnesses. In general these witnesses took the position that they knew little or nothing about the activities of Local No. 149. Thus on direct examination, Ruth Evans, forelady, denied that she had ever spoken to Benjamin Fainblatt, Orshan Ruby, supervisor of production, or anyone else, about Local No. 149, or that she had ever attended a meeting at which it was discussed. On cross-examination she was confronted with the testimony of Ruby, that he had spoken to her several times about Local No. 149, and that she had told him from time to time that the shop was being organized. Mrs. Evans then said that she did not recall whether Ruby had ever spoken to her.

That the respondents must have known the names of those active in Local No. 149, before the strike, is clear from other evidence. The testimony of Ruby, which follows, is especially instructive in view of the purported lack of knowledge of the activities of Local No. 149:

Q. Who is this one girl that would tell you about the Union?

A. I think her name was Vermilyea.

Q. Vermilyea what?

A. I don't know her second name.

Q. Is she still working for you?

A. No, she is not.

Q. Did she keep you advised of all the things that the Union boys and the Union girls were doing?

A. That is right.

Q. Would she tell you what would go on at the meetings?

A. She would from time to time. I don't know whether she did tell me the truth or not, but she used to come and tell me.

Q. Did she tell you that all during the period of time up until the strike took place?

A. Well, I would not say. For about a week or so.

Q. Did you learn from her that Fay Katz was active in the Union?

A. I have not learned from her anything of the kind.

Q. Now, you don't want to contradict yourself, do you?

A. I do not.

Q. Now, you told me that she told you all the things about the Union.

A. That does not mean to say I have learned anything from her. I have heard from her, that is about all.

Q. Heard what, about Fay Katz?

A. About Fay Katz, what is the difference Fay Katz or any of the other girls.

Q. No difference.

A. She used to come and tell me, this one and the other.

Q. She would tell you about particular individuals?

A. She would.

Q. You don't deny she told you about Fay Katz?

A. I do not.

Q. You don't deny she told you about these other girls Mr. Gerofsky asked you?

A. She did.

Q. She did?

A. Yes.

Thus the testimony brought forward by the respondents at the second hearing, far from establishing a defense, merely serves to further implicate the agents and supervisory officials of the respondents. The respondents have shown no sign of complying with the provisions of the Act, but, on the contrary, have more clearly evidenced their desire to evade their responsibilities under the Act. On this state of the record, we see no reason for modifying the order of the Board, dated June 3, 1936, with the exception of those changes noted above, and we hereby reaffirm that order.

ORDER

On the basis of the foregoing findings and supplementary findings of fact and conclusions of law and pursuant to Section 10 (c) and (e), the National Labor Relations Board hereby orders that the respondents, Benjamin Fainblatt and Marjorie Fainblatt, individuals doing

business under the firm name and style of Somerset Manufacturing Company, their successors and assigns 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.

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

(a) 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;

(b) 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 respondents' employment, as and when their labor is needed;

(c) 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;

(d) 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.