

Mike-Sell's Potato Chip Co. and Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 57, AFL-CIO-CLC. Case 09-CA-072637

August 15, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND JOHNSON

On March 19, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB 673. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning, a Division of the Noel Corp.*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's supplemental decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Supplemental Decision and Order, and we agree with the rationale set forth therein.¹ Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order² to the extent and for the reasons stated in the Supplemental Decision and Order reported at 359 NLRB 673, which is incorporated herein by reference.³

¹ In adopting the judge's finding that the Respondent unlawfully made midterm modifications to the health and welfare provisions of its collective-bargaining agreement with the Union, we rely on *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), enf. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975).

² Consistent with our decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the judge's recommended Order is modified to require the Respondent to reimburse the discriminatees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters. We shall also substitute a new notice in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

³ Member Johnson concurs that the Respondent made unlawful midterm modifications to the health and welfare terms of the parties' collective-bargaining agreement in violation of Sec. 8(a)(5) of the Act. He notes that the Respondent has excepted to some of the judge's cred-

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT make midterm modifications to the health and welfare terms of our collective-bargaining agreement with the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 57, AFL-CIO-CLC (the B&C Union) without following the contractual reopening procedures.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL restore to our employees in the bargaining unit represented by the B&C Union the contractual health and welfare benefits they enjoyed before we modified the benefits on January 1, 2012.

WE WILL make whole, with interest, all employees in the bargaining unit represented by the B&C Union for all expenses incurred and all losses suffered as a result of our unlawful modifications of the collective-bargaining agreement, including depositing into the employees'

ibility findings. In reaching this conclusion, he does not rely on the judge's conjecture that the Union would not surrender on an important issue in the parties' short bargaining meeting. Parties may agree or disagree in collective bargaining for a variety of reasons and the Board should avoid passing on the validity of parties' positions or strategies. In other respects, Member Johnson finds the record supports the judge's findings, including the judge's finding that the parties had never agreed to a midterm modification of the magnitude of the January 2012 changes in health benefits without reducing the modifications to writing. It was therefore reasonable for the judge to infer under the circumstances that such a change would have been reduced to writing. Member Johnson also agrees with the judge that inconsistencies in the union representatives' testimony about the location of their bargaining meeting does not undermine their credibility about what was said in the meeting, and that the human resource representative's testimony about the effect of the union representatives was inconsistent with the rest of the evidence and therefore less reliable.

health savings accounts the amounts we failed to contribute.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum award.

MIKE-SELL'S POTATO CHIP CO.

The Board's decision can be found at www.nlr.gov/case/09-CA-072637 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor

Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

