

Newman Livestock-11, Inc. and Ricardo Ascencio and Efrain Asencio Loza and Jose Manuel Brambila.
Cases 32–CA–084178, 32–CA–084180, and 32–CA–084191

August 28, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On November 26, 2013, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief.¹

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

The Board has considered the decision and the record in light of the exceptions and brief, and has decided to affirm the judge's rulings, findings,² and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent discharged 15 employees in retaliation for their exercise of their Section 7 right to strike until they received wages they previously had earned from the Respondent.³ He dismissed the complaint, however, based on his finding that the Respondent did not meet any of the Board's jurisdictional standards. Contrary to the judge, we find that the Respondent met the Board's nonretail-employer criteria for asserting jurisdiction. We therefore find that the mass discharge violated Section 8(a)(1) of the Act. We also find, in turn, that the discriminatees are entitled to a complete remedy of reinstatement, backpay, and notice.

I. JURISDICTION

The Board exercises discretionary jurisdiction over nonretail employers that have a "direct" or "indirect" business outflow or inflow of at least \$50,000 across state lines. Direct outflow refers to goods or services provided out-of-state by the employer itself. Indirect outflow refers to goods or services provided by the employer to in-state customers meeting any of the Board's jurisdictional standards (except indirect outflow or inflow). In applying these measures, the Board adds direct and indirect outflow together in order to determine whether an employer meets the \$50,000 threshold. *Kansas AFL-CIO*, 341 NLRB 1015, 1017 (2004); *Siemons Mailing Service*, 122 NLRB 81, 85 (1958). Here, the record establishes that we have jurisdiction over the Re-

spondent based on indirect outflow—that is, its provision of services worth more than \$50,000, cumulatively, to entities falling within the Board's jurisdiction.

The Respondent, located at all relevant times in Newman, California, slaughtered and processed livestock for business customers. Beginning in October 2011, the Respondent leased the slaughterhouse facility involved here from Petaluma Livestock Auction Yard (PLAY), a California livestock auction engaged in the selling of livestock. For at least the first 3 months of the lease, PLAY was one of the Respondent's customers. There is no dispute that PLAY met the Board's jurisdictional standards. The General Counsel's complaint alleged—and the Respondent admitted by not denying in its answer—that during the 12-month period preceding March 31, 2012, PLAY sold and shipped livestock product valued at more than \$50,000 to customers outside California.⁴

The Respondent also sold its services to Southwest Hide Co., a multistate processor and seller of animal hides. As with PLAY, there is no dispute that the Board would have jurisdiction over Southwest Hide. The complaint alleged—and the Respondent similarly admitted by not denying in its answer—that over the same 12-month period ending March 31, 2012, Southwest Hide sold and shipped goods worth more than \$50,000 from within California to customers outside California.

Accordingly, we look to the Respondent's cumulative sales of its services to PLAY and Southwest Hide to determine whether we have jurisdiction over the Respondent. The Respondent's answer to the complaint admitted that it made sales to PLAY of an unspecified value during the relevant time period. The judge found that those sales totaled at least \$35,000, but were not shown to exceed that amount. The Respondent's answer also admitted, however, that it provided slaughtering services to Southwest Hide in the amount of \$20,793 over the period alleged. In sum, then, the Respondent's sales to PLAY and Southwest Hide totaled \$55,793, exceeding the jurisdictional threshold of the indirect outflow standard. We will accordingly assert jurisdiction in this case.⁵

⁴ The Respondent's answer to the complaint took the form of a letter dated July 24, 2013, addressing several complaint allegations and ignoring others. Upon receiving the letter, the Region notified the Respondent that unaddressed allegations would be treated as admitted and extended the deadline for a supplemental response, but the Respondent did not supplement its answer.

⁵ The judge mistakenly suggested that the Board's jurisdiction was impaired by the discharges having "occurred subsequent to the time PLAY ceased doing business with the Respondent." (The Respondent failed to provide documentation that would have established the precise date of the mass discharge.) Even assuming that the judge is correct as to the sequence of those events (which is open to serious question from the record), this would be irrelevant. It is well established that for the

¹ The Respondent did not except or respond to the General Counsel's exceptions.

² The judge's fact findings with respect to the mass discharge at issue, which we adopt, implicitly credited the General Counsel's witnesses. The Respondent did not appear at the hearing despite having received timely notice.

³ The Respondent has not excepted to this finding.

Although not necessary to our finding that we have jurisdiction, we observe that this finding is confirmed by additional evidence submitted by the Respondent to the judge on October 23, 2013, after the record closed but before the judge issued his decision. That evidence, which included the Respondent's own Board affidavits and some of its business records, confirmed that the Respondent sold more than \$115,000 in services to PLAY from October 2011 to January 2012, a period encompassed by the 12-month period preceding March 31, 2012. Although no party moved to reopen the record to admit this evidence, the General Counsel waived his right to object in order to rely on the admissions contained therein. In view of the judge's implicit admission of this evidence in his decision, and the reliance of the parties (particularly the Respondent) on this evidence, we find that no due process rights would be impaired by considering this evidence without formally reopening the record.⁶ We therefore note these additional admissions as confirming our finding that we have jurisdiction over this Respondent.

II. THE MASS DISCHARGE

The judge, crediting the discharged employees' testimony, found that the Respondent fired them on or around January 11, 2012, "for concertedly refusing to work until they were paid the wages due them." As noted, the Respondent has not excepted to this finding.⁷ We accord-

purpose of determining jurisdiction any 12-month period may be used to assess a respondent's interstate business, as long as that period is reasonably related to the timing of the alleged violations, the unfair labor practice charge, or the unfair labor practice proceeding itself. See *J & S Drywall*, 303 NLRB 24, 29-30 (1991), *affd.* in relevant part sub nom. *NLRB v. Jerry Durham Drywall*, 974 F.2d 1000 (8th Cir. 1992).

⁶ In cases where we have refused to consider evidence not included in the record, we have usually been prompted to do so by a motion to strike by the non-proffering party. E.g., *Chicago Tribune*, 316 NLRB 996 fn. 1 (1995), *enf. denied* on other grounds 79 F.3d 604 (7th Cir. 1996); *California Distribution Centers*, 308 NLRB 64 fn. 3 (1992). In addition, apart from their use for impeachment, the Board has treated Board affidavits as affirmative evidence in appropriate circumstances, particularly where they are stipulated or admitted without objection. *Conley Trucking*, 349 NLRB 308, 310-312 (2007), *enfd.* 520 F.3d 629 (6th Cir. 2008); *Santa Maria El Mirador*, 340 NLRB 715, 721 (2003); *Alvin J. Bart & Co.*, 236 NLRB 242, 243 (1978), *enf. denied* on other grounds 598 F.2d 1267, 1271 (2d Cir. 1979) (finding that it was unnecessary to decide whether the affidavits at issue were correctly admitted into evidence).

⁷ There is no merit, in any case, to the Respondent's argument to the judge that the General Counsel failed to establish that Linda Kanawyer, who told the discriminatees they were fired, had the actual or apparent authority to act for the Respondent in discharging the employees. The judge clearly credited the discharged employees who testified that Kanawyer was their supervisor. In addition, Kanawyer, in her own affidavit to the Board, which the Respondent included in its October 23, 2013 submission to the judge, identified herself as the Respondent's "Plant Manager."

ingly find that the mass discharge violated Section 8(a)(1).

III. REMEDY

The discharged employees did not quit their jobs and committed no unprotected misconduct which would disqualify them from a complete remedy.⁸ Their unlawful discharges therefore converted their status from economic strikers to discriminatees, and they are consequently entitled to reinstatement and backpay.⁹ Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 102 (2014), we also shall require the Respondent to file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards.

In addition, considering the lapse of time since the violation occurred and the possibility that a workplace posting requirement will provide inadequate remedial notice to the discriminatees, we will include a notice-mailing requirement in our order regardless of whether the Respondent remains in business. See *The 3-E Co.*, 313 NLRB 12, 12 fn. 2 (1993), *enfd.* 26 F.3d 1 (1st Cir. 1994).

⁸ The judge implicitly discredited the Respondent's earlier contention that the employees consumed alcohol outside the facility after refusing to work.

⁹ E.g., *Dino & Sons Realty*, 330 NLRB 680, 688 (2000), *enfd.* 37 Fed.Appx. 566 (6th Cir. 2002). The judge incorrectly suggested that even if the Board asserted its jurisdiction and found the mass discharge unlawful, the appropriate remedy would be limited to notice-mailing. He based this opinion on his inference that the Respondent was no longer in business; on the discriminatees having informed the Respondent they would not work until they received the pay they were owed; and on the absence of any showing that they were paid or that they requested and were denied reinstatement. However, like other discriminatees unlawfully denied employment, the strikers had no obligation to request or otherwise qualify for reinstatement; it was rather the Respondent's obligation to offer reinstatement to them. *Pride Care Ambulance*, 356 NLRB 1023, 1026 (2011); *Dino & Sons Realty*, *supra*, 330 NLRB at 688; *Super Glass*, 314 NLRB 596, 596 fn. 1 (1994); *Abilities and Goodwill*, 241 NLRB 27, 27-28 (1979), *enf. denied* on other grounds 612 F.2d 6 (1st Cir. 1979). We note, however, that our Order requires the Respondent to offer the discriminatees, in relevant part, "full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions." The existence of the discriminatees' former jobs or of substantially equivalent positions may depend on whether the Respondent is still in business, see NLRB Casehandling Manual (Part Three) Compliance Sec. 10532.2, as may the duration of the backpay period, *id.* Secs. 10532.1, 10536.2. We leave these and all other remedial matters to compliance.

ORDER

The National Labor Relations Board orders that the Respondent, Newman Livestock 11, Newman, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against its employees for striking or engaging in other protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employees Jonathan Alvarez, Omar Alvarez, Joel Arroyo, Efrain Asencio Loza, Ricardo Ascencio, Jose Manuel Brambila, Jose De Jesus Lopez, Benito Gonzalez, Manuel Guerra, Jose Luis Juarez Suarez, Jesus Rodriguez, Sergio Salazar, Agustine Soltero, Luis Enrique Vera, and Victor Vera full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jonathan Alvarez, Omar Alvarez, Joel Arroyo, Efrain Asencio Loza, Ricardo Ascencio, Jose Manuel Brambila, Jose De Jesus Lopez, Benito Gonzalez, Manuel Guerra, Jose Luis Juarez Suarez, Jesus Rodriguez, Sergio Salazar, Agustine Soltero, Luis Enrique Vera, and Victor Vera whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Compensate Jonathan Alvarez, Omar Alvarez, Joel Arroyo, Efrain Asencio Loza, Ricardo Ascencio, Jose Manuel Brambila, Jose De Jesus Lopez, Benito Gonzalez, Manuel Guerra, Jose Luis Juarez Suarez, Jesus Rodriguez, Sergio Salazar, Agustine Soltero, Luis Enrique Vera, and Victor Vera for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each individual.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Jonathan Alvarez, Omar Alvarez, Joel Arroyo, Efrain Asencio Loza, Ricardo Ascencio, Jose Manuel Brambila, Jose De Jesus Lopez, Benito Gonzalez, Manuel Guerra, Jose Luis Juarez Suarez, Jesus Rodriguez, Sergio Salazar, Agustine Soltero, Luis Enrique Vera, and Victor Vera, and within 3 days thereafter, notify them in writing that this has been done and that the discharge will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its 9th Street facility in Newman, California, copies of the attached notice marked "Appendix,"¹⁰ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since January 1, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED AND MAILED 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, mail, and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on

¹⁰ We shall substitute a new notice to conform with *Durham School Services*, 360 NLRB 694 (2014). If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 discharge or otherwise discriminate against you for going on strike.

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

WE WILL, within 14 days from the date of the Board's Order, offer Jonathan Alvarez, Omar Alvarez, Joel Arroyo, Efrain Asencio Loza, Ricardo Ascencio, Jose Manuel Brambila, Jose De Jesus Lopez, Benito Gonzalez, Manuel Guerra, Jose Luis Juarez Suarez, Jesus Rodriguez, Sergio Salazar, Agustine Soltero, Luis Enrique Vera, and Victor Vera full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jonathan Alvarez, Omar Alvarez, Joel Arroyo, Efrain Asencio Loza, Ricardo Ascencio, Jose Manuel Brambila, Jose De Jesus Lopez, Benito Gonzalez, Manuel Guerra, Jose Luis Juarez Suarez, Jesus Rodriguez, Sergio Salazar, Agustine Soltero, Luis Enrique Vera, and Victor Vera whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Jonathan Alvarez, Omar Alvarez, Joel Arroyo, Efrain Asencio Loza, Ricardo Ascencio, Jose Manuel Brambila, Jose De Jesus Lopez, Benito Gonzalez, Manuel Guerra, Jose Luis Juarez Suarez, Jesus Rodriguez, Sergio Salazar, Agustine Soltero, Luis Enrique Vera, and Victor Vera for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of employees Jonathan Alvarez, Omar Alvarez, Joel Arroyo, Efrain Asencio Loza, Ricardo Ascencio, Jose Manuel Brambila, Jose De Jesus Lopez, Benito Gonzalez, Manuel Guerra, Jose Luis Juarez Suarez, Jesus Rodriguez, Sergio Salazar, Agustine Soltero, Luis Enrique Vera, and Victor Vera, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharge will not be used against them in any way.

NEWMAN LIVESTOCK-11, INC.

The Board's decision can be found at www.nlrb.gov/case/32-CA-084178 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.



Angela Hollowell-Fuentes, Esq., for the Acting General Counsel

Esmeralda Zendejas, Esq., Migrant Worker Attorney California Legal Assistance, Inc., of Stockton, California, for Ricardo Ascencio and Efrain Asencio Loza.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in 32-CA-084178 was filed by Ricardo Ascencio, an individual, on June 27, 2012. The charge in Case 32-CA-084180 was filed by Efrain Asencio Loza, an individual, on June 27, 2012. The charge in Case 32-CA-084191 was filed by Jose Manuel Brambila, an individual, on June 27, 2012. Thereafter, on June 20, 2013, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Newman Livestock-11, Inc. (the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint, denies that it has violated the Act as alleged.

The Respondent did not appear at the hearing. The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing a brief has been received from counsel for the General Counsel (the General Counsel), and the Respondent has submitted a letter dated October 23, 2013, with accompanying documents, and another letter dated November 12, 2013, in the nature of a reply brief. Upon the entire record, and based upon my observation of the witnesses and consideration of the brief and letters submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent in its answer to the complaint has contested jurisdiction.

The complaint alleges and the Respondent's answer does not deny that at all material times the Respondent has been a Cali-

California corporation with an office and place of business in Newman, California, and has been engaged in the slaughtering and processing of livestock. The record shows that the Respondent was no longer in business after May 2012.

Manuel Brazil testified that he is president of Petaluma Livestock, a livestock auction engaged in the selling of livestock to customers inside and outside of the State of California. Asked approximately how much business Petaluma Livestock did with Bartell's Meat, located in the State of Oregon, from about mid-2011 to mid-2012, Brazil testified that "Without looking at my records, it could be anywhere from 100 to 150,000 during that period."

Brazil testified that the Respondent leased the Newman, California slaughterhouse from Petaluma Livestock beginning on October 11, 2011. Further, Brazil testified that from October 11, 2011 "until approximately I believe December, same year," less than a 2- or 3-month period, Petaluma did business with the Respondent in the amount of "Gee, without looking at my records, I would approximately (sic) on a weekly basis anywhere from 5,000 to 10,000 weekly." Moreover, at the time of the alleged unfair labor practices herein, *infra*, it is clear that the Respondent was not doing business with Petaluma Livestock.

Brazil, who repeatedly said he did not look at his records, was not asked to produce any records to substantiate his approximations either with regard to dates or dollar volume of business with either Bartell's Meat or the Respondent.

On the basis of the foregoing it is clear that the General Counsel has failed to definitively show that the volume of business exceeded \$50,000 during the short period Petaluma Livestock did business with the Respondent.¹ While the General Counsel interprets Brazil's testimony to imply that the business relationship extended from October 11 through December 2011, this is not what Brazil testified. Rather, he testified that the business relationship lasted from October 11, 2011 "until approximately I believe December, same year." Accordingly, the business relationship, if it continued into December, could have ended December 1. Assuming the business relationship ended on December 1, this means there was less than a 7-week business relationship between the two entities. Moreover, given Brazil's uncertainty and his speculation regard the weekly amount of business with the Respondent, there is no way to definitively ascertain from the record evidence whether during the indefinite period in question the total dollar volume of business exceeded \$50,000 and thereby met the Board's standard for asserting jurisdiction under its indirect outflow standard. In *re Townley Sweeping Service*, 339 NLRB 301, 301 fn. 4 (2003); *Siemons Mailing Service*, 122 NLRB 81 (1958).

Accordingly, I shall dismiss the complaint on this basis.

¹ Moreover, the alleged unfair labor practices occurred subsequent to the time Petaluma Livestock ceased doing business with the Respondent.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The complaint alleges that the Respondent has violated Section 8(a)(1) and (3) of the Act by discharging employees who concertedly refused to continue working for the Respondent until they were paid their back wages.

B. Facts and Analysis

Victor Vera testified that he began working for the Respondent in October, 2011 and stopped working for the Respondent at the beginning of January, 2012. He performed a variety of duties, including butchering duties. His supervisor was Linda Kanawyer, plant supervisor or manager. In early January 2012 he and some 15 to 17 of his coworkers were not being paid on a regular basis. The discussed the matter among themselves and one day in early January they collectively decided to meet in the Respondent's parking lot and to refuse to work until they were paid their back wages. Kanawyer confronted them in the parking lot and, according to Vera, "she asked each one of us and say that if we didn't work, we were basically fired." She said, "You're 'F' fired basically." Vera had the keys to the plant and Kanawyer asked him for the keys. After they were fired they left the premises and have not returned to work. Contrary to contentions made by the Respondent in communications with the Regional Office, Vera testified that none of the employees were drinking alcohol either inside or outside the facility.

Employee Jose de Jesus Lopez testified similarly to Vera. Lopez further testified that approximately five or six or more employees returned to the facility the following day "just to claim our money." Hillel Shamam, the Respondent's owner, came out and talked to them and, according to Rodriguez, said, "when I have your money, I'll pay you and give you a call."²

On the basis of the foregoing I find that the employees were discharged for concertedly refusing to work until they were paid the wages due them. Such conduct is violative of the Act. See *Ablon Poultry & Egg Co.*, 134 NLRB 827, 829 (1961); *Toledo Commutator Co.*, 180 NLRB 973, 977 (1970). In the event the Board had jurisdiction over the Respondent, the violation would warrant the mailing of an appropriate notice, as the Respondent is no longer in business. It appears that backpay would not be due any employees subsequent to their terminations, as they had decided not to return to work until they were paid what was owed them, and there is no showing that they were paid what was owed them or requested reinstatement and were nevertheless refused reinstatement.

[Recommended Order omitted from publication.]

² While this scenario comports with the Respondent's apparent position that the employees were not discharged but simply refused to work until they were paid the wages due them, nevertheless the record evidence establishes, I find, that the employees were told they were fired.