Gaylord Chemical Co., LLC *and* United Steelworkers International Union and its Local 887. Case 10–CA–038782

October 28, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On June 25, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB 525. Thereafter, the General Counsel filed an application for enforcement in the United States Court of Appeals for the Eleventh Circuit, and the Respondent filed a cross-petition for review.

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*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

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 decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt his recommended Order to the extent and for the reasons stated in the Decision and Order reported at 358 NLRB 525 (2012), which is incorporated herein by reference.[1] The Order, as further modified herein, is set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Gaylord Chemical Company, LLC, Tuscaloosa, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the collective-bargaining representative of unit employees in Tuscaloosa, Alabama.

(b) Failing and refusing to provide the Union with requested information that is relevant and necessary for the Union's performance of its duties as a collective-bargaining representative.

(c) Creating new unit job positions without first providing the Union with notice and an opportunity to bargain.

(d) Interrogating employees about their union sympathies.

(e) 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) Recognize and bargain on request with the Union as the exclusive collective-bargaining representative of

[1] We find it unnecessary to pass on the judge's finding that the interrogation of former Union Steward and Executive Board Member Ronald Talley was unlawful, because the finding is cumulative and does not affect the remedy.

Member Johnson agrees that the Respondent violated Sec. 8(a)(5) and (1) by unlawfully repudiating its collective-bargaining relationship with the Union after it moved its chemical manufacturing facility from Louisiana to Alabama. In so finding, Member Johnson relies not only on the fact that a substantial complement of employees moved with the plant, but also on the fact that the Alabama plant's operation, and the equipment used therein, were substantially identical to what had been in place in the Louisiana facility. Moreover, the Respondent put on no witnesses to explain any key differences that would otherwise affect the standard set forth for relocation cases in *Rock Bottom Stores*, 312 NLRB 400 (1993). Member Johnson also agrees that the Respondent unlawfully interrogated employee Doug Mitchell about his union sympathies because the interrogation was undertaken by a high-level manager (Mr. Smith, the Respondent's vice president/manufacturing), after Mitchell was summoned to that manager's office, in the context of telling Mitchell that he did not need a union. Smith was present at the hearing, but did not testify. Again, in the absence of evidence provided by Smith otherwise, Member Johnson would not overturn the judge's conclusion and incorporated credibility determinations that "[i]n these circumstances, . . . Smith's questions had the reasonably foreseeable effect of discouraging employees from supporting the Union." Finally, Member Johnson notes that the Union provided evidence that, subsequent to the Respondent's move, the Union solicited, and a majority of employees signed, authorization cards. Member Johnson notes that, although such practice is not required under the standard articulated in *Rock Bottom Stores*, it may be a prudent way for a union to demonstrate to the employer the representational wishes of employees following a geographical relocation such as that presented in the instant case.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our recent decision in *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). We shall substitute a new notice to conform to the modified Order and in accordance with our decision in *Durham School Services, L.P.*, 360 NLRB 694 (2014).

Although the Respondent excepts to the judge's recommended Order, it does not specify that the judge's recommended affirmative bargaining order is improper. We therefore find it unnecessary to furnish a specific justification for that remedy. *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007) (citing *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002) ("a generalized exception to a remedial order is insufficiently specific to preserve a particular objection for appeal," and in the absence of particular exceptions the Board may issue an affirmative bargaining order without stating a rationale)). See, e.g., *Barstow Community Hospital*, 361 NLRB 352, 352 1 fn. 4 (2014).

bargaining unit employees and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Furnish the Union with the information that it requested on August 31, September 23, and October 19, 2010.

(c) Upon the Union's request, rescind or bargain over the new unit position of lead shipper.

(d) Make unit employees whole for any loss of earnings and other benefits they suffered as a result of the unilateral creation of the new unit position of lead shipper, as set forth in the remedy section of the judge's decision.

(e) Compensate employees 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 employee.

(f) 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.

(g) Within 14 days after service by the Region, post at its facility in Tuscaloosa, Alabama, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 10, 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 should 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. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2010.

(h) Within 21 days after service by the Region, file with the Regional Director 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.

[3] 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."

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 fail and refuse to recognize and bargain with the United Steelworkers Union (the Union) as your recognized collective-bargaining representative.

WE WILL NOT fail and refuse to provide the Union with requested information that is relevant and necessary to the Union's performance of its duties as your collective-bargaining representative.

WE WILL NOT create new unit job positions without first affording the Union notice and an opportunity to bargain.

WE WILL NOT question you about your union sympathies.

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 bargain with the Union on its request as the exclusive collective-bargaining representative of bargaining unit employees and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL furnish the Union with the information that it requested on August 31, September 23, and October 19, 2010, concerning your terms and conditions of employment.

WE WILL, on the Union's request, rescind our creation of the lead shipper position or bargain with the Union over it.

WE WILL make any unit employees whole, with interest, for any loss of earnings and other benefits suffered as a result of our unilateral creation of the lead shipper position.

WE WILL compensate employees 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 award to the appropriate calendar quarters for each employee.

GAYLORD CHEMICAL CO., LLC

The Board's decision can be found at www.nlrb.gov/case/10–CA–038782 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.