

Oak Harbor Freight Lines, Inc. and Teamsters Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 and Teamsters Local 174. Cases 19-CA-031797, 19-CA-031827, 19-CA-031865, 19-CA-032030, 19-CA-032031, 19-CA-031526, 19-CA-031536, 19-CA-031538, and 19-CA-031886

October 31, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND JOHNSON

On May 16, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB 328. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the Charging Party Unions filed a petition for review in the United States Court of Appeals for the Ninth Circuit. The Unions' petition for review was subsequently transferred to the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement 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*, 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.¹

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 the judge's remedy and recommended Order to the extent and for the reasons stated in the Decision and Order reported at 358

¹ On October 7, 2014, Teamsters 206 Employers Trust filed a motion to intervene in this proceeding. The Respondent filed a response, and Teamsters 206 Employers Trust filed a reply brief. We deny the motion as untimely. The Trust provided no explanation for its failure to seek intervention before the judge at the hearing stage or before the Board while the case was pending on exceptions. Further, the Trust has not shown any changed circumstances warranting its late intervention.

NLRB 328, which is incorporated herein by reference, and as further revised and set forth in full below.²

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discontinued contributions to the Oregon Warehouseman Trust, we shall order the Respondent to make whole its unit employees covered by the Oregon Trust by making all delinquent Oregon Trust fund contributions on behalf of those employees, including any additional amounts due the fund in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).³ Further, the Respondent shall be required to reimburse its unit employees for any expenses ensuing from its failure to make the required contributions to the Oregon Trust, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), including all medical expenses that were not covered by the Respondent's medical plan but would have been covered by the Oregon Trust. Such amounts should be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Re-*

² We shall modify the Order and notice to provide that, upon the Union's request, the Respondent shall rescind the health care plan it unilaterally implemented on February 26, 2009. See, e.g., *Lexus of Concord*, 330 NLRB 1409, 1418 (2000); *Whitesell Corp.*, 357 NLRB 1119, 1125 (2011), modified on reconsideration on other grounds 2011 WL 5931998 (Nov. 29, 2011). We shall also substitute a new notice in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

In rejecting the Respondent's equitable estoppel argument, Member Johnson notes that the Respondent does not contend that either a subscription agreement or an employer union pension certification has ever existed for the Oregon Trust, nor does it contend that it did not have the opportunity to bargain about it. Cf. *Manitowoc Ice, Inc.*, 344 NLRB 1222 (2005) (finding union was equitably estopped from challenging the employer's unilateral change in its profit-sharing plan, noting that the issue had been discussed at bargaining and that the union had acquiesced in all previous changes).

Further, Member Johnson agrees that the judge did not abuse his discretion in denying the Respondent's motion to amend its answer to allege the additional affirmative defense that the parties had reached impasse on the issue of benefits for returning strikers. Member Johnson finds that, even if the Respondent's defense had been properly raised, the defense fails on its merits because the Respondent has not established the requisite "economic exigency." Specifically, the Respondent has not shown that its action was caused by external events, was beyond its control, or was not reasonably foreseeable. See *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995).

³ We leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit fund in order to satisfy our "make whole" remedy. *Merryweather Optical Co.*, supra.

tarded, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).⁴

Having unilaterally implemented its company health care plan for unit employees, the Respondent shall be ordered, upon the Union's request, to restore the status quo ante by ceasing to give effect to its unilaterally implemented company health care plan for unit employees and by bargaining in good faith with the Unions over health care benefits. Further, we shall order the Respondent to restore the status quo ante in the expired collective-bargaining agreement with respect to the Oregon Trust and to continue to make contributions to that fund pursuant to the expired collective-bargaining agreement until the Respondent negotiates in good faith to a new agreement or to a lawful impasse.⁵

ORDER

The Respondent, Oak Harbor Freight Lines, Inc., California, Oregon, Washington, and Idaho, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally discontinuing required contributions into the Oregon Warehouseman Trust.

(b) Unilaterally implementing terms and conditions of employment, including its company health care plan, without having reached a genuine impasse with the Unions, and refusing to bargain in good faith with the Unions with respect to health care benefits for employees in the following appropriate bargaining unit:

All truckdrivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and other such employees as may be presently or hereafter represented by each Local Union as referenced in Appendices A, B, C, and D, engaged in local pick-up, delivery and assembling of freight, within the jurisdiction of the Local Union and office-clerical and shop employees employed by the Respondent excluding however, the classifications set forth immediately below in section 1.04.

⁴ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

⁵ In light of our finding that the Respondent's obligations to the Washington Teamsters Welfare Trust were lawfully cancelled in September 2008, we shall not order a return to the terms of the expired collective-bargaining agreement with respect to that trust or a monetary remedy for the failure to make contributions to that trust after its cancellation.

1.04 The following classifications of employees are specifically excluded from the coverage of this Agreement:

(a) confidential employees, supervisory and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended;

(b) employees already covered by an existing union contract not included in this agreement;

(c) office supervisors exercising independent judgment with respect to the responsibility for directing the work or recommending hiring and firing; and

(d) nonbargaining unit employees.

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

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

(a) Upon the Union's request, restore the status quo ante as it existed prior to February 26, 2009, by ceasing to give effect to the Respondent's health care plan for bargaining unit employees, and bargain in good faith with the Unions over health care benefits.

(b) Make unit employees covered by the Oregon Warehouseman Trust whole by paying all delinquent contributions to the Oregon Warehouseman Trust, as well as any additional amounts due to the fund, restore the status quo ante in the expired collective-bargaining agreement with respect to that fund, and continue to make contributions to that fund until the Respondent negotiates in good faith to a new agreement or to a lawful impasse.

(c) Reimburse unit employees covered by the Oregon Warehouseman Trust, with interest as provided in the amended remedy section of this decision, for any expenses resulting from its failure to make the required payments to the Oregon Warehouseman Trust.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in the States of California, Oregon, Washington, and Idaho, and mail a copy thereof to each laid-off bargaining unit employee, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms

⁶ 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 Judge's Order."

provided by the Regional Director for Region 19, 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 the event that, during the pendency of these proceedings, 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 February 26, 2009.

(f) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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.

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

and has directed us to post this notice to employees in both English and Spanish and to abide by its terms.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT unilaterally implement terms and conditions of employment, including our own health care plan, without having reached a genuine impasse with Teamsters Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 (the Unions) and WE WILL NOT refuse to bargain in good faith with the Unions with respect to health care benefits for our employees in the bargaining unit:

All truckdrivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and other such employees as may be presently or hereafter represented by each Local Union as referenced in Appendices A, B, C, and D, engaged in local pick-up, delivery and assembling of freight, within the jurisdiction of the Local Union and office-clerical and shop employees employed by us excluding however, the classifications set forth immediately below in section 1.04.

1.04 The following classifications of employees are specifically excluded from the coverage of this Agreement:

- (a) confidential employees, supervisory and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended;
- (b) employees already covered by an existing union contract not included in this agreement;
- (c) office supervisors exercising independent judgment with respect to the responsibility for directing the work or recommending hiring and firing; and
- (d) nonbargaining unit employees.

WE WILL NOT unilaterally discontinue required contributions to the Oregon Warehouseman Trust.

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

WE WILL, upon the Union's request, restore the status quo ante as it existed prior to February 26, 2009, by ceasing to give effect to our company health care plan for our employees in the above-described bargaining unit and WE WILL bargain in good faith with the Unions over health care benefits.

WE WILL make unit employees covered by the Oregon Warehouseman Trust whole by paying all delinquent contributions to the Oregon Warehouseman Trust, as well as any additional amounts due to the fund, and WE

WILL restore the status quo ante in the expired collective-bargaining agreement with respect to that fund and continue to make contributions to that fund until we negotiate in good faith to a new agreement or to a lawful impasse.

WE WILL reimburse unit employees covered by the Oregon Warehouseman Trust, with interest, for any expenses resulting from our failure to make the required payments to the Oregon Warehouseman Trust.

OAK HARBOR FREIGHT LINES, INC.

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



The Board's decision can be found at www.nlr.gov/case/19-CA-031797 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Re-