Hotel Bel-Air *and* UNITE HERE Local 11. Case 31–CA–029841

October 31, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND SCHIFFER

On September 27, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB 1528. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement.

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. On August 1, 2014, the court of appeals vacated the Board's Decision and Order, dismissed the General Counsel's cross-application for enforcement and remanded this case for further proceedings.

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 recommended Order to the extent and for the reasons stated in the Decision and Order reported at 358 NLRB 1528, which is incorporated herein by reference.[1]

[1] We shall substitute a new notice in accordance with *Durham School Services*, 360 NLRB 694 (2014).

ORDER[2]

The National Labor Relations Board orders that the Respondent, Hotel Bel-Air, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively by unilaterally implementing its April 9, 2010 severance, waiver, and release offer.

(b) Dealing directly with bargaining unit employees regarding severance, waiver, and release terms.

(c) 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) At the Union's request, rescind the waiver and release agreements signed by individual bargaining unit employees.

(b) Bargain with UNITE HERE Local 11 as the exclusive collective-bargaining representative of the employees in the following appropriate unit regarding the effects on bargaining unit employees of the temporary shutdown of the Hotel for renovation and, if an understanding is reached, embody the understanding in a signed agreement.

The appropriate unit is described in section 3, A of the August 16, 2006, to September 30, 2009 Agreement between Local 11 and the Respondent.

(c) Within 14 days after service by the Region, post at its Los Angeles, California facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on

[2] At least 179 of the approximately 220 unit employees accepted the Respondent's July 7, 2010 severance, waiver, and release offer, in which they agreed to waive any right to recall from layoff in exchange for severance pay. We will order the Respondent, at the Union's request, to rescind the waiver agreements. The General Counsel asks us additionally to order the Respondent not to seek to recoup the severance payments. We decline to so order at this time, without prejudice to the General Counsel's (or the Charging Party's) right to request such a remedy in a subsequent related unfair labor practice proceeding. See *Webco Industries*, 337 NLRB 361 (2001). Our Order requires the Respondent to bargain with the Union in good faith concerning the effects of the hotel's 2-year closure. At this juncture, we think it proper to leave the issue of severance payments for the parties to address in those negotiations as they see fit.

[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."

forms provided by the Regional Director for Region 31, 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. 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 July 7, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 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.

MEMBER MISCIMARRA, concurring.

I concur with the outcome in this case. I agree with the judge's rulings, findings, and conclusions, and I adopt the Order set forth above.

In this case, the judge found that the Respondent violated Section 8(a)(5) by unilaterally implementing on July 7, 2010, in the absence of an impasse, its April 9, 2010 final offer regarding severance pay, and by unlawfully bypassing the Union and dealing directly with unit employees as reflected in the Respondent's July 7 letter regarding severance pay. In my view, the record is insufficient to establish the existence of an impasse on July 7, and I do not believe the judge abused his discretion by excluding evidence regarding other hotel negotiations or the Union's efforts to secure a citywide standard. (I also do not believe the judge abused his discretion by admitting certain testimony by UNITE HERE Local 6 Representative Richard Maroko.) Like the judge, I also agree that the Union's representative status clearly extended beyond the contract's expiration, and the Respondent remained under an 8(a)(5) obligation, as of July 7, to refrain from implementing unilateral changes in mandatory bargaining subjects such as severance pay and to refrain from bypassing the Union and engaging in direct dealing with its employees, including those employees who had been laid off with a reasonable expectation of recall.

Finally, I agree with the rejection of the General Counsel's request for an order in this proceeding that would preclude the Respondent from seeking to recoup severance pay that we find the Respondent unlawfully provided unilaterally. Our Order requires that the Respondent and the Union bargain regarding the effects on unit employees of the temporary shutdown of the hotel for renovation. I agree it is appropriate in the first instance for the parties themselves to address the issue of severance pay in those negotiations.

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 refuse to bargain collectively by unilaterally implementing our April 9, 2010 severance, waiver, and release offer.

WE WILL NOT deal directly with bargaining unit employees regarding severance, waiver, and release terms.

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, at the request of UNITE HERE Local 11, rescind the waiver and release agreements signed by individual bargaining unit employees.

WE WILL bargain with UNITE HERE Local 11 as the exclusive collective-bargaining representative of the employees in the following appropriate unit regarding the effects on bargaining unit employees of the temporary shutdown of the hotel for renovations and, if an understanding is reached, embody the understanding in a signed agreement.

The appropriate unit is described in section 3,A of our August 16, 2006, to September 30, 2009 collective-bargaining agreement with UNITE HERE Local 11.

HOTEL BEL-AIR

The Board's decision can be found at www.nlrb.gov/case/31–CA–029841 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.