

JAG Healthcare, Inc. d/b/a Galion Pointe, LLC and Service Employees International Union, District 1199, WV/KY/OH. Cases 08–CA–039029, 08–CA–039112, and 08–CA–039133

December 15, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND SCHIFFER

On March 28, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB 699. Thereafter, the General Counsel filed an application for enforcement and the Respondent filed a cross-petition for review in the United States Court of Appeals for the Sixth 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.

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 359 NLRB 699, which is incorporated herein by reference.¹ The

¹ In affirming the judge's findings that the Respondent unlawfully discharged employees Diana Nolen, Natalie Archer, and Traci Atkins, we note that the judge relied on *Relco Locomotives, Inc.*, 358 NLRB 368 (2012), a case decided by a panel that included two persons whose appointments to the Board were not valid. See *NLRB v. Noel Canning*, supra. Prior to the issuance of *Noel Canning*, however, the United States Court of Appeals for the Eighth Circuit enforced the Board's Order in *Relco Locomotives*, see 734 F.3d 764 (2013), and there is no question regarding the validity of that court's judgment. Nevertheless, we would affirm the judge's findings regarding employees Nolen, Archer, and Atkins even without relying on *Relco*, as it is well established that the Board may infer antiunion animus from all the circumstances presented in a case. See *Facchina Construction Co.*, 343 NLRB 886, 887–888, 896–897 (2004), enf. mem. 180 Fed.Appx. 178 (D.C. Cir. 2006).

judge's recommended Order, as further modified herein, is set forth in full below.

ORDER

The National Labor Relations Board orders that the Respondent, JAG Healthcare, Inc. d/b/a Galion Pointe, LLC, Galion, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire bargaining unit employees of Village Care, the predecessor employer, because of their union-represented status during the predecessor's operation or because of their union activity, or otherwise discriminating against these employees to avoid being obligated to recognize and bargain with Service Employees International Union, District 1199, WV/KY/OH (the Union).

(b) Refusing to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time service and maintenance employees, including nurses' aides, housekeepers, dietary aides and cooks, laundry employees, activity aides, environmental aides, and maintenance helpers employed by the Respondent, but excluding all registered nurses, licensed practical nurses, department managers/supervisors, office clerical employees, technicians, professional employees, confidential employees, management employees, guards and supervisors as defined in the Act.

(c) Changing bargaining unit employees' wages, hours, and other terms and conditions of employment without first giving the Union notice and an opportunity to bargain about those changes.

In ordering the tax compensation and Social Security reporting remedies, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

In addition, we modify the judge's remedy pursuant to our decision in *Pressroom Cleaners*, 361 NLRB 643, 648 (2014). Thus, the Respondent must restore the predecessor's terms and conditions of employment until the parties bargain in good faith to agreement or impasse, and it may not attempt in compliance proceedings to prove what the terms and conditions would have been if it had complied with its obligation to bargain. In regard to the judge's recommended remedy for the Respondent's unlawful changes to unit employees' contractual benefits, we add that, to the extent that an employee has made personal contributions to a 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. Finally, we substitute the attached notice in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

(d) Telling employees that there will be no union at the Galion Pointe facility.

(e) Orally issuing or maintaining an unlawful no-solicitation/no-distribution policy.

(f) Disciplining employees or otherwise restraining, coercing, or interfering with their exercise of the rights guaranteed by Section 7 of the Act because they talk about the Union during worktime, despite allowing other nonwork-related discussions by employees.

(g) Discharging or otherwise discriminating against employees for supporting the Service Employees International Union, District 1199, WV/KY/OH, or any other union, or for engaging in union or protected concerted activities that are covered by Section 7 of the Act.

(h) 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) Notify the Union in writing that the Respondent recognizes the Union as the exclusive representative of the bargaining unit employees under Section 9(a) of the Act and that it will bargain with the Union concerning terms and conditions of employment for the bargaining unit employees.

(b) On request, bargain with the Union as the exclusive representative of bargaining unit employees at Galion Pointe regarding wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(c) On the Union's request, rescind any or all of the changes in the terms and conditions of employment for the unit employees that were unilaterally implemented on or after July 1, 2010.

(d) Make bargaining unit employees whole for losses caused by the Respondent's failure to apply the terms and conditions of employment that existed immediately before the Respondent began operations at Galion Pointe, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(e) Before implementing any changes in bargaining unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above.

(f) Within 14 days from the date of this Order, offer employment to the former employees of Village Care named below, in their former jobs or, if those jobs no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or priv-

ileges previously enjoyed, discharging if necessary any employees hired in their places:

Julie Barnhart, Martha Bair (Swiger), Martha Bishop, Sharon Brady, Jolene Dennis, Ceileata Dotson, Vicky Ely, Wanda Haney, Kathleen Mcle, Sandra Nolen, Sandra Ohler, Brenda Peterman, Brandi Riley, Shirley Sedmak, Mary Siegenthal, Bobbie Stephens, Cassandra Storer, Delena Teeter, Judy Watts, and Jackie Zent.

(g) Make the employees named in paragraph 2(f) whole for any loss of earnings and other benefits suffered because of the Respondent's unlawful refusal to hire them, in the manner set forth in the remedy section of the judge's decision as amended in this decision, less any net interim earnings, plus interest.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire the employees named in paragraph 2(f) and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(i) Within 14 days from the date of this Order, offer Natalie Archer, Traci Atkins, and Diana Nolen 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.

(j) Make Natalie Archer, Traci Atkins, and Diana Nolen whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision, less any net interim earnings, plus interest.

(k) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Natalie Archer, Traci Atkins, and Diana Nolen, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(l) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each bargaining unit employee.

(m) 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.

(n) Within 14 days after service by the Region, post at its facility in Galion, Ohio copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 8, 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 August 23, 2011.

(o) Within 21 days after service by the Region, file with the Regional Director for Region 8 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 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.

² 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."

WE WILL NOT refuse to hire bargaining unit employees of Village Care, the predecessor employer, because of their union-represented status during the predecessor's operation or because of their union activity, or otherwise discriminate against these employees to avoid being obligated to recognize and bargain with Service Employees International Union, District 1199, WV/KY/OH (the Union).

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time service and maintenance employees, including nurses' aides, housekeepers, dietary aides and cooks, laundry employees, activity aides, environmental aides, and maintenance helpers employed by the Respondent, but excluding all registered nurses, licensed practical nurses, department managers/supervisors, office clerical employees, technicians, professional employees, confidential employees, management employees, guards and supervisors as defined in the Act.

WE WILL NOT change bargaining unit employees' wages, hours, and other terms and conditions of employment without first giving the Union notice and an opportunity to bargain about those changes.

WE WILL NOT tell employees that there will be no union at the Galion Pointe facility.

WE WILL NOT orally issue or maintain an unlawful no-solicitation/no-distribution policy.

WE WILL NOT discipline you or otherwise restrain, coerce, or interfere with your exercise of the rights listed above because you talk about the Union during work-time, despite allowing other nonwork-related discussions.

WE WILL NOT discharge or otherwise discriminate against you for supporting the Service Employees International Union, District 1199, WV/KY/OH, or any other union, or for engaging in union or protected concerted activities.

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

WE WILL notify the Union in writing that we recognize it as the exclusive representative of our bargaining unit employees and that we will bargain with it concerning terms and conditions of employment for the bargaining unit employees.

WE WILL, on request, bargain with the Union as the exclusive representative of bargaining unit employees at Galion Pointe regarding wages, hours, and other terms

and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, on the Union's request, rescind any or all of the changes in the bargaining unit employees' terms and conditions of employment that we unilaterally implemented on or after July 1, 2010.

WE WILL make bargaining unit employees whole for losses caused by our failure to apply the terms and conditions of employment that existed immediately before we began operations at Galion Pointe.

WE WILL, before implementing any changes in bargaining unit employees' wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit described above.

WE WILL, within 14 days from the date of the Board's Order, offer employment to the former employees of Village Care named below, in their former jobs or, if those jobs no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in their places:

Julie Barnhart, Martha Bair (Swiger), Martha Bishop, Sharon Brady, Jolene Dennis, Ceileata Dotson, Vicky Ely, Wanda Haney, Kathleen Mcle, Sandra Nolen, Sandra Ohler, Brenda Peterman, Brandi Riley, Shirley Sedmak, Mary Siegenthal, Bobbie Stephens, Cassandra Storer, Delena Teeter, Judy Watts, and Jackie Zent.

WE WILL make the employees named in the preceding paragraph whole for any loss of earnings and other benefits suffered because of our unlawful refusal to hire them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire the above-named employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Natalie Archer, Traci Atkins, and Diana Nolen 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 Natalie Archer, Traci Atkins, and Diana Nolen whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Natalie Archer, Traci Atkins, and Diana Nolen, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each bargaining unit employee.

JAG HEALTHCARE, INC. D/B/A GALION POINTE,
LLC

The Board's decision can be found at www.nlr.gov/case/08-CA-039029 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.

