

Rose Fence, Inc. and Local 553, International Brotherhood of Teamsters. Cases 29–CA–030485 and 29–CA–030537

December 16, 2014

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND SCHIFFER

On October 22, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB 225. Thereafter, the General Counsel filed an application for enforcement in the United States Court of Appeals for the Second 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 granted the General Counsel's motion to vacate the Board's Decision and Order and to remand this case for further proceedings consistent with the Supreme Court's decision. The court also issued a mandate returning the case to the Board.

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.¹ Accordingly, we affirm the judge's rul-

¹ Member Johnson agrees with his colleagues that the Respondent violated Sec. 8(a)(5) by unilaterally laying off employees after its bargaining obligation arose. In so doing, he acknowledges the Respondent's argument that the judge erred in finding that "past practice" is not a cognizable defense to the Respondent's failure to bargain here because it is not relying on a mere "past practice," but on a decision made before its bargaining obligation arose. In the abstract, Member Johnson does not preclude the possibility that an employer might prevail on such an argument if, for example, it presented evidence of a master 10-year plan setting forth firm action tied to specific benchmarks that it would take annually. But the evidence presented here does not rise to such a level: the Respondent did not establish that it made a hard pre-bargaining obligation decision to lay off some ascertainable number or percentage of employees by some fixed formula every slow season. Indeed, Rosenzweig testified that "every year is different . . . if the year gets real lean I *might* have to reduce hours and do layoffs" (emphasis added), and it appears that there were significant swings in the number of employees laid off in the past 8–10 years. The Respondent does not except to the judge's finding that the number, timing, and terms of the postelection individual layoffs were not made in accord with a past practice of limited discretion; it merely argues that it is free to later work out the "details" of its prebargaining obligation decision. Under the facts presented here, Member Johnson believes that the policies

ings, 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 225, which is incorporated herein by reference. The judge's recommended Order, as further modified herein, is set forth in full below.²

ORDER

The Respondent, Rose Fence, Inc., Baldwin, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally laying off employees in the following bargaining unit represented by Local 553, International Brotherhood of Teamsters (the Union):

All full-time, regular part-time and seasonal drivers, installers, driver-installers, helpers, installer-helpers, yard workers and carpenters employed by the Employer at its facility located at 939 Church Street, Baldwin, New York excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

without providing the Union with timely notice and an opportunity to bargain about the decision to lay off employees and the effects of the layoff.

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

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

(a) Before implementing any layoff of bargaining unit employees notify and, on request, bargain with Local 553, International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of employees in the bargaining unit, over the decision to lay off employees and the effects of such layoff.

(b) Within 14 days from the date of the Board's Order, offer the employees unilaterally laid off after the Union's selection as collective-bargaining representative 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.

(c) Make the unit employees described above whole for any loss of earnings and other benefits suffered as a

mandating bargaining apply to the Respondent's 2010 decision to implement the consecutive layoffs and its effects.

² We shall also modify the judge's recommended Order and substitute a new notice in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). We shall further modify the notice in accordance with *Durham School Services*, 360 NLRB 694 (2014).

result of the Respondent's unilateral layoff of employees, in the manner set forth in the remedy section of the judge's decision.

(d) Compensate the unit employees described above 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.

(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 Baldwin, New York facility copies of the attached noticed marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 29, 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 the 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 July 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29 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.

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 lay off employees in the following bargaining unit represented by Local 553, International Brotherhood of Teamsters (the Union):

All full-time, regular part-time and seasonal drivers, installers, driver-installers, helpers, installer-helpers, yard workers and carpenters employed by the Employer at its facility located at 939 Church Street, Baldwin, New York excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

without providing the Union with timely notice and an opportunity to bargain about the decision to lay off employees and the effects of the layoff.

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, before implementing any layoff of bargaining unit employees notify and, on request, bargain with the Union over the decision to lay off employees and the effects of such layoff.

WE WILL, within 14 days from the date of the Board's Order, offer our employees unlawfully laid off after the Union's selection as collective-bargaining representative 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 our unit employees who were unlawfully laid off whole for any loss of earnings and other benefits suffered as a result of our unilateral layoff of employees, less any interim earnings, plus interest.

WE WILL compensate our unit employees who were unlawfully laid off for the adverse tax consequences, if any,

of receiving a lump-sum award, and WE WILL file a report with the Social Security Administration allocating their backpay awards to the appropriate calendar quarters.

ROSE FENCE, INC.

The Board's decision can be found at www.nlr.gov/case/29-CA-030485 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Re-

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

