

Evenflow Transportation, Inc. and Local 713, International Brotherhood of Trade Unions. Case 02–CA–040128

December 16, 2014

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND SCHIFFER

On July 3, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB 694. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Second 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. 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, as modified in this decision.¹ Accordingly, we affirm the judge’s rulings, findings, and conclusions, and adopt judge’s recommended Order to the extent and for the reasons stated in the Decision and Order reported at 358 NLRB 694, which is incorporated herein by reference. The judge’s recommended Order, as further modified herein, is set forth in full below.²

¹ In finding that the Respondent violated Sec. 8(a)(3) by laying off employees, we agree with the judge that the General Counsel met his initial burden of showing that the Respondent knew or suspected each individual was engaged in union activity, and that the layoffs were motivated by animus for this activity. We therefore find no need to pass on the prior decision’s alternative mass discharge analysis to find a violation.

² Consistent with our decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), we shall modify the judge’s recommended Order to require the Respondent to reimburse the discriminatees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters. We shall also substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

Finally, we find it appropriate to require a public reading of the notice to employees assembled on company time, either by the Respondent’s general manager, John Bizzarro, or by a Board agent in Bizzarro’s presence; in either case the Respondent may select another management official if it no longer employs Bizzarro. “The Respondent’s violations of the Act are sufficiently serious and widespread that the reading of the notice is necessary to enable employees to exercise their Section 7 rights free of coercion.” *Carey Salt Co.*, 360 NLRB 202, 202 (2014). Here, the Respondent’s response to efforts by its employees to unionize included repeated unlawful interrogations and threats and culminated in a mass discharge designed to purge its work force of union support. In such circumstances, this “remedy is warranted in order to dissipate as much as possible any lingering effects of the Respondent’s unfair labor practices.” *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), *enfd. mem.* 273 Fed.Appx. 32 (2d Cir. 2008). Reading of the notice by or in the presence of a responsible management official will serve “as a minimal acknowledgement of the obligations that have been imposed by law and provide[] employees with some assurance that their rights under the Act will be respected in the future.” *Whitesell Corp.*, 357 NLRB 1119, 1124 (2011). In designating Bizzarro either to read the notice or to be present at the reading by a Board agent, we emphasize that he personally participated in several of the Respondent’s unlawful actions.

Although the General Counsel did not seek an order requiring the Board’s notice to be read aloud, his failure to do so does not preclude our imposing such a remedy. *Whitesell Corp.*, supra, citing *Allied General Services*, 329 NLRB 568, 569 (1999). It is well established that remedial matters are traditionally within the Board’s province and may be addressed by the Board even in the absence of exceptions. *Id.* (citations omitted).³

ORDER

The National Labor Relations Board orders that the Respondent, Evenflow Transportation, Inc., Mount Vernon, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities or those of their coworkers.

³ Contrary to his colleagues, Member Johnson would not order notice-reading. While not preclusive of Board action, he views the General Counsel’s failure to request such a remedy as a tacit acknowledgment that the remedy is not necessary to remedy the violations found in this case. In any event, Member Johnson does not agree that the violations were sufficiently widespread and serious to warrant the requirement of notice-reading.

(b) Threatening employees with unspecified reprisals if they select the Union or any other labor organization as their bargaining representative.

(c) Laying off or otherwise discriminating against employees because they or their coworkers support Local 713, International Brotherhood of Trade Unions, or any other labor organization.

(d) 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) Within 14 days from the date of this Order, offer Julio Castro, Anthony Smidth, Nelson Rodriguez, Luis Correa, and Lindbergh Wallace 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.

(b) Make Julio Castro, Anthony Smidth, Nelson Rodriguez, Luis Correa, and Lindbergh Wallace 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.

(c) Compensate Julio Castro, Anthony Smidth, Nelson Rodriguez, Luis Correa, and Lindbergh Wallace 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 employee.

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

(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 Mount Vernon, New York facility copies of the attached notice marked "Appendix."⁴ Copies of the notice,

⁴ 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."

on forms provided by the Regional Director for Region 2, 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 1, 2010.

(g) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees either by Respondent's general manager, John Bizzarro, or at the Respondent's option by a Board agent in Bizzarro's presence; in either case the Respondent may select another management official if it no longer employs Bizzarro.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 2 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.

WE WILL NOT coercively question you about your union membership or sympathies.

WE WILL NOT threaten you with unspecified reprisals if you select the Union or any other labor organization as your bargaining representative.

WE WILL NOT lay off or otherwise discriminate against any of you because you or your coworkers support Local 713, International Brotherhood of Trade Unions, or any other labor organization.

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, within 14 days from the date of the Board's Order, offer Julio Castro, Anthony Smidth, Nelson Rodriguez, Luis Correa, and Lindbergh Wallace 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 Julio Castro, Anthony Smidth, Nelson Rodriguez, Luis Correa, and Lindbergh Wallace whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest.

WE WILL compensate Julio Castro, Anthony Smidth, Nelson Rodriguez, Luis Correa, and Lindbergh Wallace 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

award to the appropriate calendar quarters for each employee.

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

EVENFLOW TRANSPORTATION, INC.

The Board's decision can be found at www.nlr.gov/case/02-CA-040128 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.

