

**A.W. Farrell & Son, Inc. and United Union of Roofers, Waterproofers, and Allied Workers, Local 162 and Sheet Metal Workers International Association, AFL-CIO, Local No. 88.** Cases 28–CA–023502, 28–CA–060627, and 28–CA–062301

December 16, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND SCHIFFER

On July 11, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB 1463. Thereafter, the Respondent filed a petition for review 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 Board issued an order setting aside the Decision and Order and retained this case on its docket for further action as appropriate.<sup>1</sup>

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 there as modified below. 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 1463, which we incorporate by reference. The

<sup>1</sup> Charging Party Roofers Local 162 (the Union) filed a motion for reconsideration of the July 11, 2013 decision and a motion to recall the case from the court of appeals and consolidate it with two pending cases involving the same parties. The Respondent filed an opposition to the Union's motions and a cross-motion for reconsideration, and the Party in Interest, Sheet Metal Workers Local 88, filed briefs in opposition to the Union's motions and in support of the Respondent's cross-motion. We deny the motion for reconsideration, the motion to recall, and the cross-motion for reconsideration as moot. We deny the motion to consolidate because the Board has issued its Decision and Order quashing the notice of hearing in one of the cases, 360 NLRB No. 34 (2014), and the remaining case can be resolved separately but consistently with this decision.

Order, as further modified here, is set forth in full below.<sup>2</sup>

AMENDED REMEDY

The Union excepted to the Board's failure to require the Respondent to pay out of its own pocket back dues that employees owe to the Union. The Board customarily directs that dues owed to a union be deducted from employees' backpay. *Ogle Protection Services*, 183 NLRB 682, 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971). It is well established, however, that when an employer has unlawfully repudiated a collective-bargaining agreement, the Board will require the employer to reimburse the union for dues payments that it failed to make where employees signed valid dues-deduction authorizations. See *Gadsden Tool, Inc.*, 340 NLRB 29, 30 (2003), enf. 116 Fed.Appx. 245 (11th Cir. 2004), citing *Williams Pipeline Co.*, 315 NLRB 630, 632 (1994); *Sommerville Construction Co.*, 327 NLRB 514, 514 fn. 2 (1999), enf. 206 F.3d 752 (7th Cir. 2000), citing *W.J. Holloway & Son*, 307 NLRB 487, 487 fn. 3 (1992); *West Coast Cintas Corp.*, 291 NLRB 152, 156 fn. 6 (1988). Accordingly, we shall modify the Order to require the Respondent to remit dues to the Union on behalf of its employees who executed dues authorizations to the Union prior to or during the period of the Respondent's unlawful conduct, at no cost to the employees.<sup>3</sup>

The Union also excepted to the Board's failure to require the Respondent to mail the notice to current and former employees. We find merit in this exception. In *Sommerville*, supra, the Board found notice-mailing appropriate where there had been "a significant amount of employee turnover" since the employer repudiated the contract. 327 NLRB at 514 fn. 2. Here, the record establishes that between August 21 and December 30, 2010, 7 of 13 employees—over half—left the Respondent's employ. Further, we take administrative notice of the ongoing, related litigation among the parties to this case, as well as the effect of the unfair labor practices.<sup>4</sup> For these reasons, we shall require the Respondent to mail the no-

<sup>2</sup> We note that the Union requested the additional remedies in its original exceptions. As the Board did not expressly address those exceptions in its Decision and Order, we do so now on our de novo review. In affirming the tax compensation and Social Security reporting remedies, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). We shall also substitute a new notice in accordance with *Durham School Services*, 360 NLRB 694 (2014).

<sup>3</sup> The repudiated 2010–2012 collective-bargaining agreement, like the prior agreements, contained a dues-checkoff provision (Article XXIII). In order to avoid a double recovery by the Union, payment shall be offset by dues the Union collected for the compliance period on behalf of employees covered by the dues payment order.

<sup>4</sup> See *A.W. Farrell & Son, Inc.*, Case 28–CA–085434, and *Sheet Metal Workers (A. W. Farrell & Son, Inc.)*, 360 NLRB 178 (2014).

tice to all current and former unit employees employed by the Respondent at any time from the onset of the unfair labor practices. This requirement will help ensure that affected employees are informed of their Section 7 rights and the specific remedies afforded to them to make them whole for the unfair labor practices that occurred during their employment.

#### ORDER

The National Labor Relations Board orders that the Respondent, A.W. Farrell & Son, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Refusing to recognize and bargain with United Union of Roofers, Waterproofers, and Allied Workers, Local 162 as the collective-bargaining representative of the Las Vegas, Nevada employees in the following bargaining unit:

All regular full-time and part-time skilled roofer and damp and waterproof workers, including apprentices, pre-apprentices, allied workers, other classifications of workers and any person performing the duties of all safety monitoring of work, excluding managers, guards, and supervisors as defined in the Act.

(b) Failing and refusing to execute and implement the 2010–2012 collective-bargaining agreement agreed to by the Respondent, containing the terms and conditions of employment of the unit employees set forth in paragraph 1(a).

(c) Failing and refusing to bargain collectively with the Union by delaying, failing, and refusing to provide the Union with the information described in its June 29, 2011 written request.

(d) Unreasonably limiting the Union's use of the information provided.

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

2. Take the following affirmative action.

(a) Recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in unit described above in paragraph 1(a) concerning their terms and conditions of employment.

(b) Execute and implement the agreement described above in paragraph 1(b), and give retroactive effect to its terms to the effective date of the agreement.

(c) Remit to the Union, at no cost to employees, dues payments required by the agreement described above in paragraph 1(b) for employees who executed checkoff authorizations prior to or during the period of the Respondent's unlawful conduct, as described in the amended remedy section of this decision.

(d) Make unit employees whole for any losses they have suffered as a result of the Respondent's failure to sign and effectuate the agreement, plus daily compound interest, as set forth in the remedy section of the decision.

(e) Compensate 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 unit employee.

(f) Furnish to the Union in a timely manner the information it requested on June 29, 2011.

(g) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, 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 internet site, and/or other electronic means, if the Respondent customarily communicates with 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.

(h) Within 14 days after service by the Region, duplicate and mail, at its own expense, after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix" to all current and former unit employees employed by the Respondent at any time since August 17, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 28 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

<sup>5</sup> 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."

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 recognize and bargain with United Union of Roofers, Waterproofers, and Allied Workers, Local 162 as the exclusive collective-bargaining representative of our Las Vegas, Nevada employees in the following bargaining unit:

All regular full-time and part-time skilled roofer and damp and waterproof workers, including apprentices, pre-apprentices, allied workers, other classifications of workers and any person performing the duties of all safety monitoring of work, excluding managers, guards, and supervisors as defined in the Act.

WE WILL NOT fail and refuse to execute and implement the 2010–2012 collective-bargaining agreement reached with the Union.

WE WILL NOT refuse to bargain collectively with the Union by delaying, failing, or refusing to provide the Union with the information described in its June 29, 2011 written request.

WE WILL NOT unreasonably limit the Union's use of the information provided.

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 recognize and bargain with the Union as the exclusive collective-bargaining representative of our

employees concerning terms and conditions of employment in the bargaining unit.

WE WILL execute and implement the 2010–2012 collective-bargaining agreement negotiated with the Union and give retroactive effect to its terms.

WE WILL remit to the Union, at no cost to employees, dues payments required by the agreement described above for employees who executed checkoff authorizations prior to or during the period of the Respondent's unlawful conduct, as set forth in the amended remedy section of the Board's decision.

WE WILL make unit employees whole for any losses they have suffered as a result of our failure to sign and effectuate the 2010–2012 agreement, plus daily compound interest.

WE WILL compensate 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 unit employee.

WE WILL promptly provide the Union with the information described in its June 29, 2011 written request.

A.W. FARRELL & SON

The Board's decision can be found at – [www.nlrb.gov/case/28-CA-023502](http://www.nlrb.gov/case/28-CA-023502) 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.

