OS Transport LLC and HCA Management, Inc. *and* Teamsters Local No. 350, International Brotherhood of Teamsters, Change to Win. Cases 32–CA–025100, 32–CA–025399, and 32–CA–025490

March 19, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On August 31, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB 1048. Thereafter, the General Counsel filed an application for enforcement in the United States Court of Appeals for the Ninth 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, cross-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,[1] 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 1048, which is incorporated herein by reference.[2] The judge's recommended Order, as further modified herein, is set forth in full below.[3]

[1] Contrary to our colleague, we agree with the judge that the Respondent unlawfully reduced the work assignments of Ceferino Urias Velasquez. In doing so, we observe that the Respondent unlawfully threatened to reduce employees' work assignments in retaliation for their Sec. 7 activity (in which Urias Velasquez engaged) of signing and presenting a group letter of protest to the Respondent's owner in early May 2010. Further, the Respondent clearly made good on that threat with respect to the three other employees: Efrain Gutierrez Najera, Primitivo Guzman, and Jose Urias. With respect to Urias Velasquez, comparing the months before and after the employees' protected activity, the evidence shows that he lost nearly 25 percent of his Saturday work assignments. For example, Urias Velasquez received 13 Saturday assignments over the 8 months immediately preceding the letter, but only 10 such assignments over the succeeding 8 months. He received two Saturday assignments in each of the 4 months prior to the letter but received two or more Saturday assignments in only one of the subsequent 8 months. This loss is consistent with the Respondent's retaliation against the other employees and is unexplained by legitimate business considerations. Our colleague states that Urias Velasquez' testimony is internally inconsistent. It is true that Urias Velasquez testified (Tr. 345) that there was no change in his work in May 2010. His testimony, however, suggests that he may not have understood the question to encompass the months following May; only a few questions later, Urias Velasquez testified (Tr. 346) that he began receiving fewer Saturday assignments and that they were instead given to less senior drivers who were hired after the presentation of the protest letter. Urias Velasquez' testimony as a whole is consistent with the judge's finding that more work opportunities were offered to newly hired and antiunion drivers at the expense of those drivers who had engaged in protected activity. We therefore affirm the judge's finding, with respect to all four employees, that the evidence supports an inference of retaliatory motive and that the Respondent failed to rebut that inference.

Member Johnson notes initially, in accord with the rationale of the prior Board decision, that the record does not establish that the Respondent consistently distributed Saturday work assignments equally among its employees or that drivers regularly worked an average of 2 Saturdays a month prior to the protected concerted protest letter signed by 11 prounion employees on April 20, 2010, and presented to the Respondent in early May. The Acting General Counsel therefore bore the burden to prove an adverse employment action—a reduction in work assignments—for each alleged discriminatee. He agrees with his colleagues that the burden was met with respect to Efrain Gutierrez Najera, Primitivo Guzman, and Jose Urias. However, he would find that, as with alleged discriminatees Enedino Millan and Jose Velasquez, the record does not sufficiently establish a reduction in Saturday work assignments for Ceferino Urias Velasquez. His own testimony on this matter was internally inconsistent and, as such, insufficient to prove actual loss. Thus, the more relevant evidence is the document showing Saturday work assignments made to him in 2009 and 2010. It is true that Urias Velasquez worked 2 Saturdays in each of the 4 months preceding the protest letter and a total of 13 assignments in the preceding 8 months, and that he worked only 1 Saturday in May and June as well as a total of 10 assignments in the 8 months following the protest letter. It is equally true, however, that Urias Velasquez did not work any Saturdays in 8 months of 2009, including June and July, and that he only worked multiple Saturdays in 2 months of that year. Further, after the protest letter Velasquez worked an unprecedented 4 Saturdays in July 2010, and thereafter he worked 1 Saturday in every month but September for the remainder of that year. In other words, he worked 10 Saturdays in the 8 months following presentation of the protest letter, but worked only 8 Saturdays for the same period in 2009. In light of this inconsistent pattern of monthly Saturday assignments, Member Johnson finds that the General Counsel has failed to meet his burden of showing that Urias Velasquez actually lost work. Accordingly, Member Johnson would dismiss the complaint allegation with respect to him. See *Simmons Co.*, 314 NLRB 717, 725 (1994) ("There is no evidence of any adverse action taken by the employer . . . and thus no prima facie case."). For the sole reason of the absence of exceptions, Member Johnson also would uphold the special remedies imposed by the judge.

[2] The Decision and Order reported at 358 NLRB 1048 inadvertently stated that the employees' protest letter was presented in early May 2009. It was presented in early May 2010.

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

ORDER

The National Labor Relations Board orders that the Respondent, OS Transport LLC and HCA Management, Inc., San Martin, California, and Las Vegas, Nevada, a single employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to terminate employees because they engaged in activities on behalf of Teamsters Local Union No. 350, International Brotherhood of Teamsters, Change to Win (the Union), or other protected concerted activities, such as signing a letter complaining about working conditions.

(b) Threatening to close its business because its employees engaged in union and other protected concerted activities.

(c) Promising or granting employees benefits, including more lucrative route assignments, if they abandon their support for the Union.

(d) Implying that employees' support of the Union is futile by telling them that they are not employees and therefore cannot be represented by a union.

(e) Threatening to reduce employees' work assignments and hours if they supported the Union or engaged in other protected concerted activities.

(f) Reducing employees' work assignments and hours because they supported the Union or engaged in other protected concerted activities.

(g) Discharging employees because they supported the Union or engaged in other protected concerted activities, such as signing a letter complaining about working conditions.

(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) Within 14 days from the date of this order, offer Jesus Garcia Marquez and Alberto Pizano 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 Jesus Garcia Marquez and Alberto Pizano 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.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Jesus Garcia Marquez and Alberto Pizano, and within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Make Jesus Garcia Marquez, Alberto Pizano, Miguel Reynoso, Marcial Barron Salazar, Efrain Gutierrez Najera, Primitivo Guzman, Jose Urias, and Ceferino Urias Velasquez whole for any loss of earnings and other benefits suffered as a result of the reduction in their work assignments and/or hours, in the manner set forth in the remedy section of the judge's decision, and restore the work assignments and hours of those employees.

(e) Compensate Jesus Garcia Marquez, Alberto Pizano, Miguel Reynoso, Marcial Barron Salazar, Efrain Gutierrez Najera, Primitivo Guzman, Jose Urias, and Ceferino Urias Velasquez 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.

(f) 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.

(g) Within 14 days after service by the Region, post at its San Martin, California, facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 32, 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 members 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. The notice shall be posted in English and Spanish. 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

[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."

and former employees employed by the Respondent at any time since April 30, 2010.

(h) Within 14 days after service by the Region, hold a meeting or meetings during working time, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by the Respondent's owner, Hilda C. Andrade or, at the Respondent's option, by a Board agent in Andrade's presence, with translation available for Spanish-speaking employees.

(i) Supply the Union, on its request, with the names and addresses of unit employees, updated every 6 months, for a period of 1 year or until a certification after a fair election.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 32 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 amended consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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 threaten to terminate our employees because they engaged in activities on behalf of Teamsters Local Union No. 350, International Brotherhood of Teamsters, Change to Win (the Union), or other protected concerted activities, such as signing a letter complaining about working conditions.

WE WILL NOT threaten to close our business because our employees engaged in union or other protected concerted activities.

WE WILL NOT promise or grant our employees benefits, including more lucrative route assignments, if they abandon their support for the Union.

WE WILL NOT imply that our employees' support of the Union is futile by telling them that they are not employees and therefore cannot be represented by a union.

WE WILL NOT threaten to reduce our employees' work assignments and/or hours if they supported the Union or engaged in other protected concerted activities.

WE WILL NOT reduce our employees' work assignments and/or hours because they support the Union or engage in other protected concerted activities.

WE WILL NOT discharge employees because they support the Union or engage in protected concerted activities, such as signing a letter complaining about working conditions.

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 Jesus Garcia Marquez and Alberto Pizano 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 Jesus Garcia Marquez and Alberto Pizano whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL compensate Jesus Garcia Marquez, Alberto Pizano, Miguel Reynoso, Marcial Barron Salazar, Efrain Gutierrez Najera, Primitivo Guzman, Jose Urias, and Ceferino Urias Velasquez 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 employee.

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

WE WILL make Jesus Garcia Marquez, Alberto Pizano, Miguel Reynoso, Marcial Barron Salazar, Efrain Gutierrez Najera, Primitivo Guzman, Jose Urias, and Ceferino Urias Velasquez whole for any loss of earnings and other benefits suffered as a result of the reduction in their work assignments and/or hours, plus interest, and WE WILL restore the work assignments and hours of those employees.

WE WILL compensate Jesus Garcia Marquez, Alberto Pizano, Miguel Reynoso, Marcial Barron Salazar, Efrain Gutierrez Najera, Primitivo Guzman, Jose Urias, and Ceferino Urias Velasquez for the adverse tax conse-

quences, 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 employee.

WE WILL supply the Union, on its request, with the names and addresses of unit employees, updated every 6 months, for a period of 1 year or until a certification after a fair election.

OS TRANSPORT LLC AND HCA MANAGEMENT, INC.

The Board's decision can be found at www.nlrb.gov/case/32-CA-025100 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.