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American Baptist Homes of The West d/b/a Piedmont Gardens *and* Service Employees International Union, United Healthcare Workers-West. Cases 32–CA–025247, 32–CA–025248, 32–CA–025266, 32–CA–025271, 32–CA–025308, and 32–CA–025498

August 24, 2016

ORDER DENYING MOTION

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On May 31, 2016, the National Labor Relations Board issued a Decision and Order in this proceeding, finding that the Respondent violated Section 8(a)(3) and (1) of the Act by delaying the reinstatement of certain strikers and refusing to reinstate others. In making those findings, the Board determined that the Respondent's stated reasons for hiring permanent replacements for the strikers—to punish the strikers and the Union and to avoid future strikes—constituted proof of an "independent unlawful purpose." 364 NLRB No. 13, slip op. at 3 (2016) (quoting *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964)). The Respondent has moved for reconsideration.

We deny the motion. The Respondent argues why it disagrees with the Board's decision, but it has not identified any material error or demonstrated extraordinary circumstances warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations.[1] Nonetheless, the Respondent argues that the Board erred by applying "a new standard" retroactively, and we address that argument here.

The Respondent's argument proceeds from an incorrect premise. The Board did not make law in this case, but, as stated in the decision and explained below, applied existing law. Even if the decision had announced a new standard, the Respondent's argument would fail.

The Board's customary practice is to apply new policies and standards "to all pending cases in whatever stage."[2] Accordingly, the Board applies a new rule to the parties in the case in which the rule is announced so long as doing so would not work a "manifest injustice."[3] In determining whether the retroactive application of a Board decision would result in manifest injustice, the Board balances three factors: (1) the reliance of the parties on preexisting law; (2) the effect of retroactivity on accomplishing the purposes of the Act; and (3) any particular injustice arising from retroactive application.[4]

Regarding the first factor, the Board's approach in its decision in this case was not a departure from well-settled precedent. Rather, the Board reaffirmed its longstanding rule that an employer is prohibited from permanently replacing striking employees if that decision is motivated by an "independent unlawful purpose." *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964) (footnote omitted). The Board interpreted that language as it has previously been interpreted by the Board and the United States Court of Appeals for the Second Circuit. See, e.g., *Avery Heights*, 343 NLRB 1301 (2004), vacated and remanded, *New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 195 (2d Cir. 2006), after remand 350 NLRB 214 (2007), enfd. *Church Homes, Inc. v. NLRB*, 303 Fed.Appx. 998 (2d Cir. 2008), cert. denied 558 U.S. 945 (2009).

Regarding the second factor, we find that application of the alleged "new standard" accomplishes the purposes of the Act by clarifying how that standard is to be applied in future decisions and by providing relief to employees denied employment on account of the Respondent's unlawful discrimination against them.

[1] In support of its motion, the Respondent cites, as it did previously in the underlying proceeding, *Choctaw Maid Farms, Inc.,* 308 NLRB 521, 528 (1992), a case in which the judge stated that the employer's state of mind in hiring permanent replacements is "irrelevant." That case is inapposite. First, it was not a *Hot Shoppes* case. The issue was whether the employer continued to hire permanent replacements after the employees made an unconditional offer to return to work, not whether the employer's reason for hiring permanent replacements was independently unlawful. Nowhere is the *Hot Shoppes* "independent unlawful purpose" issue mentioned. Second, as the judge in the instant case noted in fn. 53 of his decision, the "Board did not discuss" the judge's "state of mind" statement in *Choctaw*, and it is unclear whether the issue of the employer's motive was even alleged or litigated in that case. Finally, the judge in *Choctaw* cited no authority for the proposition that an employer's state of mind in hiring permanent replacements is irrelevant, and our holding rejected it as inconsistent with *Hot Shoppes* and *Avery Heights*, infra.

Member Miscimarra adheres to the views expressed in his dissenting opinion in the underlying decision. See 364 NLRB No. 13, slip op. at 9–19 (Member Miscimarra, dissenting). Consequently, because Member Miscimarra dissents from the majority's "independent unlawful motive" test in this case, he respectfully disagrees with the majority's statement that its prior decision "applied existing law," and Member Miscimarra believes the new standard adopted by the majority cannot appropriately be applied retroactively. Moreover, Member Miscimarra does not join in his colleagues' discussion of *Choctaw Maid Farms*, supra. However, he agrees with his colleagues that the Respondent's motion does not identify extraordinary circumstances that warrant reconsideration of the Board's decision.

[2] *Aramark School Services*, *Inc.,* 337 NLRB 1063, 1063 fn. 1 (2002) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)).

[3] *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993).

[4] *Machinists Local 2777 (L-3 Communications)*, 355 NLRB 1062, 1069 fn. 37 (2010).

Finally, regarding the third factor, we do not find that any particular injustice arises from the application of the *Hot Shoppes* standard here or, as the Respondent contends, based on the passage of time since the violations occurred. First, all of the factors that the Board analyzed in the decision were litigated at the hearing. Second, the cases cited by the Respondent in support of its passage-of-time argument are inapposite, as the remedy here does not include a bargaining order; there is nothing punitive about the Board's standard make-whole remedy.

Accordingly, we find that the Board's decision to this case does not cause manifest injustice to the Respondent.

IT IS ORDERED, therefore, that the Respondent's motion for reconsideration is denied.

Dated, Washington, D.C. August 24, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD