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Midwest Terminals of Toledo International and Otis Brown and Miguel Rizo, Jr. and Mark Lockett, Sr. and Local 1982, International Longshoremen's Association, AFL-CIO. Cases 08-CA-038092, 08-CA-038581, 08-CA-038627, 08-CA-063901, 08-CA-073735, 08-CA-092476, 08-CA-097760, and 08-CA-098016

December 15, 2017

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On March 31, 2015, the Board issued a Decision and Order in this proceeding, which is reported at 362 NLRB No. 57. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

Acting General Counsel Lafe E. Solomon issued the consolidated complaints in this case on March 28, 2013 and April 29, 2013. On March 21, 2017, the United States Supreme Court issued its decision in *NLRB v. SW General, Inc. d/b/a Southwest Ambulance*, 580 U.S. ___, 137 S. Ct. 929 (2017), holding that, under the Federal Vacancies Reform Act of 1998, Solomon's authority to take action as Acting General Counsel ceased on January 5, 2011, after the President nominated him to be General Counsel. See 2017 WL 1050977. 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. SW General*, supra, we have considered whether the complaints are valid and whether the complaint allegations are properly before the Board for decision. On August 16, 2017, then-General Counsel Richard F. Griffin Jr. issued a Notice of Ratification in this case that states, in relevant part,

The prosecution of this case commenced under the authority of Acting General Counsel Lafe E. Solomon during the period after his nomination on January 5, 2011, while his nomination was pending with the Senate, and before my confirmation on November 4, 2013.

On March 21, 2017, the United States Supreme Court held that Acting General Counsel Solomon's authority under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., ceased on January 5, 2011, when the President nominated Mr. Solomon for the po-

sition of General Counsel. *NLRB v. SW General, Inc. v. NLRB*, 580 U.S. ___, 137 S. Ct. 929 (March 21, 2017).

I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act. Congress provided the option of ratification by expressly exempting, pursuant to FVRA Section 3348(e)(1), "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA.

For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

In view of the independent decision of General Counsel Griffin to ratify the complaints and to continue prosecution in this matter, we find that the complaint allegations are properly before the Board for decision.

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. Accordingly, we affirm the judge's rulings, findings,¹ and conclu-

¹ The General Counsel, Charging Party, and Respondent filed statements of position on remand. The Order remanding the case to the Board states that the Respondent "may raise its laches argument on remand." However, in its position statement, the Respondent does not preserve its contention that the allegations arising from the charges filed in Cases 08-CA-038092, 08-CA-038581, and 08-CA-038627 should be dismissed based on the doctrine of laches. Accordingly, we view the Respondent's argument as having been abandoned. Even if the Respondent had properly raised this defense, we would affirm the judge and the Board's earlier rejection of this defense because the defense of laches does not bar action by the Board, as a federal government agency, to vindicate public rights. See *Entergy Mississippi, Inc.*, 361 NLRB 892, 893 fn. 5 (2014), enfd. in relevant part 810 F.3d 287 (5th Cir. 2015); *F. M. Transport, Inc.*, 302 NLRB 241 (1991).

Member Kaplan agrees with then-Member Johnson's dissenting footnote in the now-vacated Decision and Order. 362 NLRB No. 57, slip op. at 1, fn. 1 (2015). Thus, it is his view that the complaint allegation based on Case 08-CA-038581, which alleged that the Respondent violated Sec. 8(a)(1) by Supervisor Tim Jones telling employee Miguel Rizo, Sr., that he could not hire people off the "regular" hiring list because they had charges against the company, should be dismissed because the General Counsel's unexplained delay in processing and litigating the charge was prejudicial to the Respondent's case. Contrary to his colleagues, Member Kaplan disagrees that the Respondent waived the defense of laches by failing to raise it in its position statement. The fact that the court of appeals, in its order vacating the prior decision, indicated that the Respondent could raise its laches argument on remand did not amount to a requirement that the Respondent repeat an argument already properly raised in its exceptions.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by refusing to assign Brown light-duty work from No-

sions and adopt his recommended Order to the extent and for the reasons stated in the Decision and Order reported at 362 NLRB No. 57 (2015), which is incorporated herein by reference. The Order, as further modified herein, is set forth in full below.²

ORDER

The National Labor Relations Board orders that the Respondent, Midwest Terminals of Toledo International, Inc., Toledo, Ohio, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Refusing and failing to comply with the dues-checkoff provision of the May 22, 2012 memorandum of understanding with Local 1982, International Longshoremen's Association, AFL-CIO (the Union).

(b) Refusing to assign work to employees because of their support for and activities on behalf of the Union or other protected concerted activities.

(c) Threatening not to hire employees because they filed grievances under the collective-bargaining agreement and unfair labor practice charges with the National Labor Relations Board.

(d) Threatening employees with future discipline because they filed a grievance.

(e) Coercively telling employees that the Union had caused them to lose overtime.

(f) Threatening to remove from the job or discharge employees because they engaged in union and/or other protected concerted activity.

(g) Grabbing employees because they engaged in union and/or other protected concerted activity.

(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 of the date of this Order, begin deducting and remitting to the Union dues owed to it as required under the terms of the May 22, 2012 memorandum of understanding and reimburse the Union for the losses resulting from its failure to deduct and remit union dues since January 1, 2013, as set forth in the remedy section of the judge's decision.

(b) Make Otis Brown whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Otis Brown for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful written threat to discipline Miguel Rizo, Jr., and within three days thereafter, notify the employee in writing that this has been done and that the threat to discipline him will not be used against him 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 Toledo, Ohio facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 8, 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 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 June 1, 2008.

vember 28 through December 2, 2008, we note that there are no exceptions to the judge's finding that the General Counsel demonstrated that the Respondent's action was motivated by antiunion animus.

² In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. We shall modify the Order to reflect this remedial change and we shall substitute new notices to conform to the Order as modified.

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."

(g) Within 21 days after service by the Region, file with the Regional Director for Region 22 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.

Dated, Washington, D.C. December 15, 2017

Mark Gaston Pearce,	Member
Lauren McFerran,	Member
Marvin E. Kaplan,	Member

(SEAL) 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 refuse and fail to comply with the dues-checkoff provision of our May 22, 2012 memorandum of understanding with Local 1982, International Longshoremen’s Association, AFL–CIO (the Union).

WE WILL NOT refuse to assign work to you because of your support for and activities on behalf of the Union or your other protected concerted activities.

WE WILL NOT threaten not to hire you because you filed grievances under the collective-bargaining agree-

ment and/or unfair labor practice charges with the National Labor Relations Board.

WE WILL NOT threaten you with future discipline because you filed a grievance.

WE WILL NOT coercively tell you that the Union caused you to lose overtime.

WE WILL NOT threaten to remove you from the job or discharge you because you engaged in union and/or other protected concerted activity.

WE WILL NOT grab you because you engaged in union and/or other protected concerted activity.

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 of the Board’s order, deduct and remit to the Union dues owed to it as required by the parties’ May 22, 2012 memorandum of understanding, and WE WILL reimburse the Union, with interest compounded daily, for the losses resulting from our failure to deduct and remit union dues since January 1, 2013.

WE WILL make Otis Brown whole for any loss of earnings and other benefits resulting from out discrimination against him, less any net interim earnings, plus interest.

WE WILL compensate Otis Brown for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful written threat to discipline Miguel Rizo, Jr., and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the threat to discipline him will not be used against him in any way.

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.

The Board’s decision can be found at www.nlr.gov/case/08-CA-038092 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

