

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION**

NOVELIS CORPORATION,

AND

**UNITED STEEL, PAPER AND
FORESTRY, RUBBER
MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE
WORKERS, INTERNATIONAL UNION,
AFL-CIO.**

**CASES: 03-CA-121293
 03-CA-121579
 03-CA-122766
 03-CA-123346
 03-CA-123526
 03-CA-127-24
 03-CA-126738**

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AFL-CIO.**

CASE: 03-CA-120447

NOVELIS CORPORATION’S MOTION FOR RECONSIDERATION

Respondent Novelis Corporation (“Novelis” or “the Company”) respectfully submits this motion for reconsideration of the Board’s December 7, 2018 Supplemental Decision and Order, 367 NLRB No. 47 (“Supplemental Decision.”), in part.

Novelis limits its request for reconsideration to the Supplemental Decision’s special remedies (Sections (a) and (b) of the Board’s Order), as well as the accompanying notice posting and certifications obligations (Sections (c) and (d) of the Board’s Order), and the Appendix that follows from these special remedies. Novelis respectfully submits that the Board erred in issuing the special remedies.

I. The Second Circuit Did Not Remand To The Board For Consideration Of Additional Remedies

Through its August 26, 2016 Order, 364 NLRB No. 101 (2016), the Board found that a *Gissel* bargaining order was warranted. At no time prior to the Board issuing its decision did Counsel for the General Counsel seek the special remedies contained in the Board's Supplemental Decision. Instead, it demanded a bargaining order. Upon Novelis' petition for review of the Board's 2016 order to the U.S. Court of Appeals for the Second Circuit (and the Board's cross-petition for enforcement), the Second Circuit denied enforcement of the bargaining order, holding that after review of the record and fully-briefed issues, there was no basis to issue a bargaining order. *See Novelis Corp. v. NLRB*, 885 F.3d 100, 111 (2d Cir. 2018).

After the issuance of the Second Circuit mandate, the Board's counsel gave no indication that it wished the Court to reconsider the remedies provided in the mandate and treated the mandate as a final judgment and required Novelis to comply with the remedy as enforced by the Second Circuit (which Novelis promptly did in full over six months ago). Simply put, the judgment which the mandate enforces is final. *See SEIU Local 250, AFL-CIO v. NLRB*, 640 F.2d 1042, 1044 (9th Cir. 1981) (holding that NLRB was without jurisdiction to reconsider merits of a claim, which was not addressed or remanded by appellate court in its adjudication of union's case; therefore, the court's implied determination that claim was without merit was final); *Scepter, Inc. v. NLRB*, 448 F.3d 388 (D.C. Cir. 2006) ("under 29 U.S.C. § 160(e), it is obvious that the Board cannot modify an order over which the court has exclusive jurisdiction or that the court has enforced in a final judgment"); *Dupuy v. NLRB*, 806 F.3d 556, 563-64 (D.C. Cir. 2015) ("*Scepter* and those other appellate decisions [holding that only a court may modify its mandate] have a lot of company. For almost four decades, and in at least nine separate

decisions, the Board has taken the position that it ‘has no jurisdiction to modify a court-enforced order.’”).

The Second Circuit’s decision is “the law of the case” of these proceedings. *See Hanson Cold Storage Co. of Indiana*, 2018 WL 1082556, at *2 (Feb. 26, 2018) (accepting the appellate court’s order as the law of the case on remand from the Seventh Circuit); *Southcoast Hosps. Grp., Inc.*, 365 NLRB No. 140 (Oct. 6, 2017) (same on remand from the First Circuit); *LaShawn A v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) (under the law of the case doctrine, “the same issue presented a second time in the same case in the same court should lead to the same result”).

The Second Circuit remanded this case to the Board for resolution of two issues: 1) compliance with the enforced portions of the Board’s order; and 2) consideration of the lawfulness of Novelis’ former email use and social media rules in light of the Board’s issuance of *The Boeing Company*, 365 NLRB No. 154 (2017) while the case was pending before the Second Circuit. *See Novelis*, 885 F.3d at 103, 111. The Second Circuit’s directive was clear and included no invitation for the Board to reconsider any new remedies. *Id.* at 111.

Importantly, the Second Circuit declined enforcement of the Board’s order concerning Novelis’ social media policy and expressly stated that said issue “may be reconsidered on remand,” while when denying enforcement of the bargaining order it gave no such qualification that there be reconsideration of additional remedies (special or otherwise) on remand. *Id.* Had the Court intended for the Board to consider special remedies in light of its decision not to enforce the bargaining order, it would have expressly said so just as it did in regard to the social media policy. The fact that it did not, and that it never otherwise suggested the remedies determination was remanded for additional consideration, compels the conclusion that this case

was not remanded to give the Board the option of issuing additional special remedies nearly five years after the conduct occurred.¹

The Board's counsel could have sought reconsideration, appealed or requested remand to consider these issues. However, it took none of these steps, and instead the Region affirmatively required Novelis to comply with the mandate as issued by the Second Circuit in May 2018.

II. The Special Remedies Are Not Justified By The Record

When imposing special remedies, such as those that provide the Union with access to an employer's property, the Board must substantiate its conclusion that access is necessary to offset the consequences of unlawful employer conduct by pointing to record evidence supporting its conclusion. Here, the Board's decision does not contain any reference to record evidence supporting its conclusion that "special remedies are necessary in order to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices and to ensure that a fair election can be held if the Union files a new petition." *Novelis Corporation*, 367 NLRB No. 101. The Board's decision made no finding that supports the notion that employees, including the hundreds hired and employed since the unfair labor practice violations committed nearly five years ago, cannot freely exercise their Section 7 rights and that a fair election could not be held.²

¹ To conclude otherwise would defy the plain language of the order and the well-known principle *expressum facit cessare tacitum* (if some things are expressly mentioned, the inference is stronger that those not mentioned were intended to be excluded). *See, e.g., State v. Davis*, 814 S.E.2d 701 (Ga. 2018).

² While Novelis does not concede that either of the ordered special remedies are appropriate, both of the remedies together are not necessary. Indeed, in light of the remedy requiring Novelis to provide the Union with a list of proposed unit employees' names, addresses, telephone numbers, and email addresses (which would permit the Union with instant access to employees), should the Board be inclined to adhere to this unit list requirement, the bulletin board remedy should be removed from the Board's amended order as duplicative, punitive and an unnecessary intrusion upon Novelis' property rights. What is more, the bulletin board remedy is unclear and could lead to compliance problems. For instance, it is unclear how "reasonable access" would be interpreted, particularly at an aluminum manufacturing plant where significant safety measures must be undertaken as to and by employees and visitors alike. This vague remedy is not specific enough and could lead to inadvertent compliance disputes despite Novelis' good faith efforts.

III. There Are No Lingering Effects Requiring Further Remediation

Further, there is no evidence of lingering effects of Novelis' conduct. Indeed, the evidence is to the contrary. As stated in Novelis' Brief in Support of its Exceptions to ALJ's Decision and Proceedings, filed with the Board on April 3, 2015 ("Exceptions Brief"), the record contains no evidence even suggesting traditional remedies would be inadequate. *See* p. 61-82.

Novelis incorporates its prior arguments from its Exceptions Brief as to why the record does not support a finding of lingering effects, but wishes to highlight for the Board that Novelis' prior remedial actions have extinguished any need for further remedies. It is undisputed that following the election and the filing of the instant charges, in June 2014, both Plant Manager Chris Smith and CEO Phil Martens sent correspondence to all Novelis employees to clarify any possible misunderstandings regarding their comments during their 25th Hour speeches. R-Exs. 54, 56. Additionally, as the Second Circuit found, "Novelis fully complied with the District Court's 10(j) order, which required a public reading of the order to all employees, publication of the order throughout the plant, and reinstatement of Abare. The 10(j) order in and of itself suggests the unlikelihood of reoccurring unfair practices." *Novelis*, 885 F.3d at 110. This finding is binding as law of the case.

What is more, Novelis has completed all of its compliance obligations following the Second Circuit's remand. The Board has long held traditional remedies, particularly public notice readings, are an "effective but moderate way to let in a warming wind of information and, more important, reassurance." *U.S. Serv. Indus., Inc.*, 319 NLRB 231, 232 (1995); *see also N. Mem'l Health Care*, 364 NLRB No. 61 (2016) (ordering public notice reading "[t]o dissipate as much as possible any lingering effect of [] Respondent's serious and wide-spread [ULPs] and enable employees to exercise their Section 7 rights free of coercion ..."). Indeed, the Board's General Counsel has recognized that the public reading remedy is "designed to eliminate these

coercive and inhibitive effects and restore an atmosphere in which employees can freely exercise their Section 7 rights.” Memorandum GC 11-01, 2010 WL 7141477, at *2 (Dec. 20, 2010). Accordingly, Novelis’ remedial actions, particularly the public readings, postings, and mass email communications, have eliminated any alleged effects of the ULPs. *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1432 (2d Cir. 1996); *NLRB v. Century Moving & Storage, Inc.*, 683 F.2d 1087, 1093 (7th Cir. 1982).

Finally, it is worth noting the lack of any unfair labor practices committed by Novelis since those found by the Board in the instant case approximately five years ago, the passage of time between the election (in February 2014) and the Board's Supplemental Decision (in December 2018), the turnover of company leadership, and significant employee hiring and turnover since the election.³ All of these factors support the notion that the special remedies are not necessary.

IV. Conclusion

For all of the foregoing reasons, Novelis respectfully requests the Board to reconsider its Supplemental Decision and strike the special remedies ordered therein.

Respectfully submitted this 4th day of January, 2019.

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³ These and other factors counseling against the necessity of special remedies are set forth in detail in prior filings with the Board, as well as in the Second Circuit’s decision.

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CERTIFICATE OF SERVICE

I certify that on this 4th day of January, 2019, I caused the foregoing to be electronically filed with the National Labor Relations Board at <http://nrlb.gov> and a copy of same to be served by e-mail on the following parties of record:

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