Wayneview Care Center and Victoria Health Care Center *and* SEIU 1199, New Jersey Health Care Union. Cases 22–CA–26987, 22–CA–26988, 22–CA–27119, and 22–CA–27365

November 18, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

On August 26, 2008, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 352 NLRB 1089.[1] Thereafter, the Respondents jointly filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the court of appeals 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.[2]

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order to the extent and for the reasons stated in the decision reported at 352 NLRB 1089 (2008), which is incorporated herein by reference.[3]

The prior decision adopted the judge's findings that Respondents Wayneview Care Center and Victoria Health Care Center violated Section 8(a)(3), (5), and (1) by locking out their employees. We reaffirm that decision and emphasize four points.

First, the Respondents did not argue that the lockouts were lawful "offensive" lockouts for the sole purpose of pressuring the Union to accept a legitimate bargaining position. See *Allen Storage & Moving Co.*, 342 NLRB 501, 501 (2004). Accordingly, we need not rely on the judge's finding that Respondent Wayneview's lockout was unlawful under *Dayton Newspapers*, 339 NLRB 650, 656–658 (2003), enfd. in rel. part 402 F.3d 651 (6th Cir. 2005) (finding a lockout unlawful where the employer never clearly communicated the conditions it would accept to end the lockout).

Second, we agree with the judge, for the reasons stated in her decision, that the Respondents violated Section 8(a)(5) and (1) by locking out their employees in order to coerce the Union to accept an unlawful, unilaterally implemented final offer. See *Royal Motor Sales*, 329 NLRB 760, 777 fn. 51 (1999), enfd. 2 Fed. Appx. 1 (D.C. Cir. 2001).

Third, we agree with the judge's finding that the Respondents failed to show that either the Wayneview lockout or the Victoria lockout was a lawful "defensive" lockout reasonably necessary to ensure continued patient care. The judge discredited the testimony of the Respondent Wayneview's witness that she had made a 2-week commitment to hire temporary replacements for potential strikers. Similarly, there is no evidence of any such commitment to replacement workers at Victoria. Furthermore, there is no evidence that the Union was planning another strike or further picketing at Victoria or that the Union would not adhere to its decision to limit concerted activity at Wayneview to 1 day of informational picketing during employees' nonworking time. Even if additional activity had been planned at either facility, the Union would have been required by Section 8(g) of the Act to give 10 days' advance notice (a legal obligation the Union had fully complied with in relation to the initial activity). Under these circumstances, the Respon-

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

[2] Consistent with the Board's general practice in cases remanded from the courts of appeals, and for reasons of administrative economy, the panel includes the remaining member who participated in the original decision. Furthermore, under the Board's standard procedures applicable to all cases assigned to a panel, the Board Members not assigned to the panel had the opportunity to participate in the adjudication of this case at any time up to the issuance of this decision.

Member Pearce is recused and has taken no part in considering this case.

[3] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. Also, we shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

dents have failed to show a legitimate and substantial business justification for the lockouts.

Fourth, even if the lockouts had been lawful at their inception, beginning September 6, 2005, at Wayneview and shortly before September 6 at Victoria, the Respondents began allowing some employees but not others to return to work. The lockouts thus became partial lockouts. As found by the judge, the Respondents failed to show a legitimate and substantial business justification for reinstating some employees, but not others. See *Field Bridge Associates*, 306 NLRB 322, 334 (1992), enfd. 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993). We therefore agree with the judge that the Respondents' partial lockouts were unlawful. [4]

AMENDED REMEDY

Respondent Wayneview, having unlawfully suspended and locked out employees, and Respondent Victoria, having unlawfully locked out employees and refused to reinstate economic strikers upon their unconditional offer to return to work, must offer those employees reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of the suspension, lockout, or refusal to reinstate to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In addition, Respondent Wayneview, having unlawfully implemented new terms and conditions of employment, and Respondent Victoria, having unlawfully withdrawn benefits and uniform allowances and unlawfully implemented new terms and conditions of employment, must make the affected employees whole for any loss of earnings and other benefits resulting from that unlawful conduct in the manner prescribed in *Ogle Protection Services*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus daily compound interest as prescribed in *Kentucky River,* supra. Respondent Victoria must also reimburse employee Geraldine Morgan (whom the Respondent unlawfully treated as an on-call, "no-frills" employee without benefits after the lockout) for any expenses resulting from the withdrawal of her health benefits, as set forth in *Ogle*, supra, and *Kraft Plumbing and Heating*, 252 NLRB 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), plus daily compound interest as prescribed in *Kentucky River*, supra.

[4] Having found the lockouts unlawful for the above reasons, we need not rely on the judge's finding that Respondent Wayneview's lockout was motivated by antiunion animus.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified in 352 NLRB 1089 and as further modified below, and orders that the Respondents, Wayneview Care Center, Wayne, New Jersey, and Victoria Health Care Center, Matawan, New Jersey, their officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for section A, paragraph 2(g).

"(g) Within 14 days after service by the Region, post at its Wayne, New Jersey facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 22, 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 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. In the event that, during the pendency of these proceedings, 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 early August 2005."

2. Substitute the following for section B, paragraph 2(h):

"(h) Within 14 days after service by the Region, post at its Matawan, New Jersey facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 22, 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 cus-

[5] 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."

[6] 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."

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Dated, Washington, D.C. November 18, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD