Eugene Iovine, Inc. *and* Local Union No.3, International Brotherhood of Electrical Workers, AFL–CIO. Cases 29–CA–21052, 29–CA–21086, 29–CA–21840–3, 29–CA–21879–1, 29–CA–21879–2, and 29–CA–22030

April 7, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

On September 30, 2008, the two sitting members of the Board issued a Supplemental Decision and Order in this proceeding, which is reported at 353 NLRB 400.[1] Thereafter, the General Counsel filed a petition for enforcement in the United States Court of Appeals for the Second Circuit, which was granted by the court on March 30, 2010. *NLRB v. Eugene Iovine, Inc*., 371 Fed.Appx. 167 (2d Cir. 2010). 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.

On October 12, 2010, the Supreme Court granted certiorari in the instant case, vacated the judgment of the United States Court of Appeals for the Second Circuit, and remanded the proceeding to that court for further consideration in light of *New Process Steel*, supra. *Eugene Iovine, Inc. v. NLRB*, 131 S.Ct. 458 (2010). Thereafter, the Court of Appeals for the Second Circuit remanded this case to the Board 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, to modify his remedy, and to adopt the recommended Order to the extent and for the reasons stated in the decision reported at 353 NLRB 400 (2008),[3] which is incorporated herein by reference, except as modified below.[4]

AMENDED REMEDY

The Respondent, having unlawfully laid off bargaining unit employees for economic reasons without providing the Union timely notice and a opportunity to bargain about the decision to lay off employees and its effects, must offer those employees and other similarly situated employees reinstatement and make them whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct, computed on a quarterly basis from the date of the layoffs 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).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified in 353 NLRB 400 and as further modified below, and orders that the Respondent, Eugene Iovine, Inc., Farmingdale, New York, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its Farmingdale, New York facility, copies of the at-

[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 appeal, 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 Member 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.

[3] In affirming the decision, we make the following modification of the rationale set forth in the above-referenced decision. While we affirm the finding that the Respondent failed to establish that it had a past practice of unilaterally laying off employees either prior to or after the Union's 1993 certification, we further find that even had the Respondent established that such a past practice existed prior to 1993, when another union represented its employees, this would not privilege its action here. Thus, we agree with the judge that the Respondent may not establish a past practice defense privileging its unilateral changes based on the acquiescence of a union that previously represented the unit employees, where—as here—the Union has not acquiesced to such unilateral changes. See, e.g., *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999), enfd. 1 Fed.Appx. 8 (2d Cir. 2001). The judge's discussion and resolution of this issue are fully consistent with Board precedent.

[4] 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).

tached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 29, 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 December 6, 1996."

Dated, Washington, D.C. April 7, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD